Docket for 04-10566

(20)

No. 04-10566
Title: Moises Sanchez-Llamas, Petitioner
v.
Oregon
Docketed: June 13, 2005
Lower Ct: Supreme Court of Oregon
Case Nos.: (S51289)
Decision Date: March 10, 2005
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jun 7 2005	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 13, 2005)
Jun 20 2005	Waiver of right of respondent Oregon to respond filed.
Jul 7 2005	DISTRIBUTED for Conference of September 26, 2005.
Jul 14 2005	Response Requested . (Due August 15, 2005)
Aug 15 2005	Brief of respondent Oregon in opposition filed. (Distributed)
Oct 3 2005	DISTRIBUTED for Conference of October 7, 2005.
Oct 24 2005	DISTRIBUTED for Conference of October 28, 2005.
Oct 31 2005	DISTRIBUTED for Conference of November 4, 2005.
Nov 7 2005	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to Questions 1 and 2 presented by the petition. This case is consolidated with No. 05-51, Bustillo v. Johnson, which is granted limited to Question 1 presented by the petition, and a total of one hour is allotted for oral argument. VIDED.
Nov 29 2005	Motion for enlargement of time for oral argument, for divided argument, and for leave to participate in oral argument as amicus curiae filed by the Solicitor General. VIDED.
Dec 8 2005	Consent to the filing of amicus briefs in support of either party received from counsel for petitioner Sanchez-Llamas. VIDED.
Dec 12 2005	Motion for enlargement of time for oral argument, for divided argument, and for leave to participate in oral argument as amicus curiae GRANTED. The time is to be divided as follows: 45 minutes for the petitioners, 15 minutes for respondent in No. 04-10566, 15 minutes for respondent in No. 05-51, and 15 minutes for the Solicitor General as amicus curiae in support of respondents. VIDED.
Dec 13 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner Bustillo. VIDED.
Dec 20 2005	Motion to dispense with printing the joint appendix filed by petitioners Moises Sanchez-Llamas. VIDED.
Dec 21 2005	Consent to the filing of amicus briefs in support of either party received from counsel for respondent Oregon. VIDED.
Dec 21 2005	Brief amici curiae of European Union and Members of the International Community filed. VIDED.
Dec 21 2005	Brief amici curiae of Ambassador L. Bruce Laingen, et al. filed. VIDED.
Dec 22 2005	Brief amici curiae of Law Professors filed. VIDED.
Dec 22 2005	Brief amicus curiae of Republic of Honduras and Other Foreign Sovereigns filed. VIDED.

Dec 22 2005	Motion to appoint counsel filed by petitioner Moises Sanchez-Llamas.
Dec 22 2005	Brief amicus curiae of Government of United Mexican States filed.
Dec 22 2005	Brief amici curiae of Bar Associations, et al. filed. VIDED.
Dec 22 2005	Brief amici curiae of Former United States Diplomats filed. VIDED.
Dec 22 2005	Brief amicus curiae of International Court of Justice Experts filed. VIDED.
Dec 22 2005	Brief amicus curiae of Association of the Bar of City of New York filed. VIDED.
Dec 22 2005	Brief of petitioner Moises Sanchez-Llamas filed.
Dec 22 2005	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Jan 4 2006	Motion DISTRIBUTED for Conference of January 20, 2006.
Jan 9 2006	Application (05A624) of the Solicitor General for leave to file a consolidated amicus curiae brief in excess of page limits, submitted to The Chief Justice. VIDED.
Jan 10 2006	Extension of time within which to file respondent's brief on the merits to and including January 31, 2006. VIDED.
Jan 12 2006	Application (05A624) to file in excess of page limits granted by The Chief Justice. The brief may not exceed 50 pages.
Jan 23 2006	Motion to appoint counsel filed by petitioner GRANTED. Peter Gartlan, Esquire, of Salem, Oregon is appointed to serve as counsel for the petitioner in this case.
Jan 23 2006	Motion to dispense with printing the joint appendix filed by petitioners GRANTED.
Jan 23 2006	SET FOR ARGUMENT on Wednesday, March 29, 2006.
Jan 23 2006	CIRCULATED.
Jan 30 2006	Brief amicus curiae of Alliance Defense Fund filed. VIDED. (Distributed)
Jan 31 2006	Brief of respondent Oregon filed. (Distributed)
Jan 31 2006	Brief amici curiae of Professors of International Law, et al. filed. VIDED. (Distributed)
Jan 31 2006	Brief amicus curiae of United States filed. VIDED. (Distributed)
Jan 31 2006	Brief amicus curiae of Criminal Justice Legal Foundation filed. VIDED. (Distributed)
Jan 31 2006	Brief amici curiae of Alabama, et al. filed. VIDED. (Distributed)
Feb 9 2006	Motion for divided argument filed by petitioners. VIDED.
Feb 27 2006	Motion for divided argument filed by petitioner GRANTED.
Mar 7 2006	Reply of petitioner Moises Sanchez-Llamas filed. (Distributed)
Mar 10 2006	Letter from the Solicitor General proposing the lodging of non-record material.
Mar 15 2006	Record received from Supreme Court of Oregon. (1 box)
Mar 29 2006	Argued. For petitioner in No. 04-01566: Peter Gartlan, Salem, Ore. For peptitioner in No. 05-51: Mark T. Stancil, Washington, D.C. For respondent in No. 04-10566: Mary H. Williams, Oregon Solictor General, Salem, Ore. For respondent in No. 05-51: William E. Thro, State Solicitor General, Richmond, VA; and Gregory G. Garre, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

(19)

No. 04-10566

In The
Supreme Court of the United States

MOISES SANCHEZ-LLAMAS

Petitioner

vs.

STATE OF OREGON

Respondent

On Writ of Certiorari
To The Supreme Court of Oregon

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Vienna Convention convey individual rights of consular notification and access to a foreign detainee enforceable in the Courts of the United States?

2. Does the state's failure to notify a foreign detainee of his rights under the Vienna Convention result in the suppression of his statements to police?

3. Do police violate an intoxicated foreign detainee's rights under the Fifth and Fourteenth Amendments to the United States Constitution when they obtain custodial statements from that detainee after he has been beaten, continually questioned for 11 hours and not informed of his rights to consular notification and access?

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OPINIONS AND ORDERS BELOW

The Circuit Court for the State of Oregon entered an unpublished criminal judgment against petitioner. The Oregon Court of Appeals affirmed petitioner's conviction without opinion. That decision is reported at *State v. Sanchez-Llamas*, 191 Or. App. 399, 84 P.3d. 1133 (2004) (App 12). The Oregon Supreme Court order allowing review is reported at *State v. Sanchez-Llamas*, 337 Or. 34, 93 P. 3d. 71 (2004) (App 13). The Supreme Court opinion affirming petitioner's convictions is reported at *State v. Sanchez-Llamas*, 338 Or. 267, 108 P. 3d. 573 (2005) (App 14-23). The Oregon Supreme Court subsequently ordered the final appellate judgment to be held in abeyance pending United States Supreme Court action on this petition for writ of certiorari. That order was not reported and is attached at App 24.

STATEMENT OF JURISDICTION

The Oregon Supreme Court issued its decision is this case on March 10, 2005. This court has jurisdiction pursuant to Article III, Section 2, of the United States Constitution, and 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI of the United States Constitution provides in pertinent part:

> "This Constitution and the Laws of the United Sates * * *; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

"* * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *"

Article 36 of the Vienna Convention on Consular Relations, 21 U.S.T. 77, 100-01 (hereinafter "Vienna Convention"), provides:

"(1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

"(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

"(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

"(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

"(2) The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

The Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, 21 U.S.T. 326, T.I.A.S. No. 6820 provides:

> "Disputes arising out of the interpretation or application of the Convention shall be within the compulsory jurisdiction of the International Court of Justice."

STATEMENT OF THE CASE

Facts from Pretrial Motion to Suppress Statements

Defendant was charged with numerous counts, including two counts of attempted aggravated murder due to the fact that the victims were police officers. Prior to trial, petitioner moved to suppress his statements to police on two grounds. First, petitioner argued that his statements were made unknowingly and involuntarily in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution as well as the Oregon Constitution. Second, petitioner argued that his statements were obtained in violation of the Vienna Convention, thereby violating his right to Due Process. A copy of petitioner's motion is attached at App 1-9. The following facts summarize the hearing on that motion.

Petitioner speaks little English. (Tr 76, 108, 136) Shortly after 3:00 a.m., on December 18, 1999, petitioner shot at two police officers and wounded one of them. (Tr 16-27, 36-46, 52-67) After the shooting, Misty Senter saw petitioner run along the back of a row of duplexes in a confused manner, like he was "going around in circles." (Tr 88) Out of sight of police officers, petitioner put the two handguns he was carrying on the ground. (Tr 29, 46, 50-51, 67-68, 70, 88-90) Police officers located petitioner and told him in English to show his hands and to come out from behind the building. (Tr 27-28, 30, 46-47, 68, 88, 90, 94, 104-105) There were at least 10 officers present at the time of the arrest. (Tr 33)

After first showing the officer his hands, one at a time, petitioner came out with his hands up, stopped and turned around as instructed, but did not go down on his knees as instructed. (Tr 47, 69-71, 90, 111-13) One officer, fearing that petitioner still had a gun, tackled petitioner, knocking him face-down to the ground. (Tr 47-48, 71, 106) Three other officers joined in to subdue and handcuff petitioner who was struggling. (Tr 34, 48, 71, 96-96, 106-07) The arresting officers administered punches and "focus blows" with a flashlight to his face, back and arms to effect the arrest. (Tr 49, 91, 106)

At 3:48 a.m., petitioner was examined by a paramedic at the police department. (Tr 75) She asked him in English if he was in pain, if he wanted to go to the hospital and if he wanted her to treat him. (Tr 76-77) Petitioner just shook his head and said, "No." (Tr 77) He told her, "Bang, Bang," and mimed being hit on the head and chest. (Tr 81-82) Although she could only communicate with petitioner in a limited way, the paramedic concluded that petitioner was alert, oriented to person, place, time and events and "capable of understanding and making appropriate decisions." (Tr 79-81)

Police detective William Ford began interrogating petitioner at 4:36 a.m. (Tr 123) "Community Service Officer" Arturo Vega acted as interpreter. (Tr 118, 175) Those two officers, a third officer and petitioner sat in a room measuring 11 feet by 10 feet. (Tr 118-20, 122-23; Exh. No. 7) Ford testified that petitioner appeared "heavily intoxicated" but also appeared "coherent" and able to communicate "effectively." It did not appear as if petitioner could not understand what was going on. (Tr 124-25, 176)

Petitioner was advised of his *Miranda* rights in Spanish and English. (Tr 122) Petitioner indicated that he understood his rights. (Tr 123) In pertinent part, petitioner told the police that he was walking to his brother's house when he first saw the police across the street. (Tr 147) He

admitted that he had a black .357 magnum revolver. (Tr 148) He saw the police running behind the duplexes. (Tr 150) As he was crossing the street, he heard someone shooting, but did not think the police were shooting at him. (Tr 150) After he saw the police and heard the shots, he got scared and got rid of the gun. (Tr 125, 150, 205) He heard the police tell him to raise his hands. (Tr 151) He did not resist the police. (Tr 151) Petitioner denied firing the gun. (Tr 126, 148, 151) He denied possessing a second gun. (Tr 149)

At 5:55 a.m., the officers took a ten-minute break. (Tr 126) Oregon State Police detective Barthel joined Ford and Vega. They resumed the interview and brought a tape-recorder. (Tr 126-27) Petitioner began complaining of being dizzy and in pain, and he wanted to lie down on the floor. (Tr 128-29) At 7:00 a.m., they took him to the hospital. (Tr 129)

At the hospital, at 7:15 a.m., petitioner was examined by a nurse and a doctor. (Tr 129, 163) Nurse Beatrice Martinez is fluent in Spanish. (Tr 161) She testified that petitioner was "slurry", lethargic and not "fully alert." (Tr 162-65) She felt that he was "sort of just coming off the alcohol, so to speak, sort of like a morning hangover type when you're sort of lethargic and not totally with it, but not out of it." (Tr 165)

At 7:33 a.m., while petitioner while was lying on a bed waiting to be x-rayed, Ford, Vega and Barthel resumed their interrogation. (Tr 129-30) Petitioner was re-advised of his *Miranda* rights in Spanish and English. (Tr 129) He said that he understood them and was feeling better. (Tr 129-30) Police continued the interrogation with a few short breaks for medical attention. Petitioner continued to deny shooting at police. (Tr 130-34)

At 9:00 a.m., petitioner was taken back to the police station. (Tr 134) The officers resumed their interrogation at 9:45 a.m. in an office measuring 10 feet by 10 feet. (Tr 120, 135; Exh. No. 8) The three officers, Ford, Vega and Barthel, were joined by a fourth officer, Teresi.

(Tr 135) Barthel, through Vega, told petitioner that he must be honest with the officers "because you are not going to have many chances to tell us." (Tr 135, 152; Exh. No. 1, p 1) Vega told petitioner that he "is going to go a lot further being honest with [the police] than lying to [the police]" and that the "police are going to find out anyway, so it's better that you talk now. Better than * * * later, they go after you more, ok?" (Tr 179-80; Exh. No 1, p 6)

In this phase of the interrogation,[1] petitioner said that "they" shot at him first, that he was not doing anything and that he did not know why they were shooting. (pp 2, 7, 8, 15) When he shot back, he was shooting up in the air. (p 3) After being told it did not matter how many guns he had, he admitted having a second gun. (pp 4-5) He said he did not pull out the second gun until he left it on the ground. (pp 8, 12) He only fired with one gun. (pp 7, 12)

When challenged as to how he could hit an officer if he were only firing into the air, petitioner demonstrated that he fired the gun as he was bringing it up. (pp 16-17) He said that he only fired two shots with the first gun. (pp 17-18) When the officers repeatedly asked petitioner if he could have fired more than two shots, petitioner said that he might have fired more shots with the other gun. (pp 16-19) The officers then suggested that, "When you were shooting in the air with the chrome one is when you pulled out the black one?" (p 20) Petitioner agreed, but then said that he did not shoot much with the black gun. (pp 20-21) When asked how many bullets he fired with the black gun, petitioner told them three or maybe four.[2] (pp 21, 24, 50) The officer persistently asked petitioner if he fired the shots from the black gun straight ahead. (Ex No 1, pp 22-24) Petitioner first said yes, and then denied it. (pp 21-22)

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[1] The following page citations all refer to Exhibit No. 1, the transcript of the interrogation submitted at the hearing on the motion to suppress. That transcript covered most of that phase of the interrogation beginning at 9:45 a.m. and lasting until 11:00 a.m.

[2] Evidence at trial established that petitioner fired five or six shots from only one gun, the chrome .357 magnum revolver. (Tr 485, 584-85, 719-20, 730, 771)

Eventually, after police told petitioner that it did not matter whether he had shot at police or civilians, petitioner admitted that he shot into the air because he did not want to damage the officers. (pp 38-50) Near the end of this phase of the interrogation, the officers asked petitioner to describe his *Miranda* rights. (Tr 61-64) Petitioner said, "that it would be better if I told the truth and everything". (p 64) He then asked if that was right. (p 65) When asked if the police promised him anything, petitioner said, "No" and that he did not remember. (pp 65-66) When asked if the police had frightened him in any way, petitioner said he did not remember and then, when pressed, said, "Yes, that, that, that, I was going to, to be, ah, locked up longer. That's what I remember that you told me, right? That, that, that I was going to have more, more trouble, that's all * * * if, if, if I didn't tell the truth, you told me." (pp 66) When asked if he was being honest with the police, petitioner said, "Yes, right now, right now, I have told you everything, I have, because you told me to, right?" (p 69) When asked if he made his statements voluntarily and because he wanted to, petitioner said, "Yes, well, to you all, because you told me that if I didn't you-know-what, didn't you tell me that? I, I, that's why, that's why I told you the whole truth, better you told me. That's right, I, I better tell you everything right now." (pp 69-70)

The interrogation stopped for lunch at 11:00 a.m. and resumed at 11:45 a.m. (Tr 137-38) At that time, Barthel had left. (Tr 138) The interrogation continued until 12:45 p.m. with a 10-minute break in the middle.[3] (Tr 138-39).

After the interrogation was over, Ford and Vega put petitioner in a police car and drove around town so that petitioner could point out his brother's house and his truck. (Tr 139) They had him sign a consent form to search his truck. (Tr 139-40)

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[3] Statements made in that phase of the interrogation were not included in the transcript submitted at the hearing on the motion to suppress. (Tr 12; Exh. No. 1) The pertinent portion of that interrogation is summarized in the trial facts below.

At 2:30 p.m., eleven hours after his arrest, petitioner was jailed. (Tr 142, 155-56) He had been in handcuffs the entire time. (Tr 157)

Defense expert Dr. Jose LaCalle is a clinical psychologist who specializes in "cross-cultural Hispanic" forensic psychology. (Tr 186-90) He evaluated petitioner and found him to be "low average" in intelligence. He has poor language skills even in his native language, Spanish. (Tr 191-96)

Reviewing the translation of the *Miranda* rights used in this case, LaCalle noted that one needed an 8th or 9th grade level of education to understand the construction of the Spanish sentences. (Tr 2220-21) He further explained that it is one thing to understand the language of the *Miranda* rights and another to understand the concept of the rights. In many Latin American areas, including petitioner's native rural Mexico, that concept is completely foreign. The population has great fear of the police. In petitioner's case, his native fear of the police was greatly actualized by the beating he received from police officers. (Tr 196-98, 219-20)

Reviewing the transcript of the interrogation, LaCalle believed that petitioner never understood that he could tell the police that he did not want to talk to them. (Tr 201-06) In sum, in LaCalle's opinion, petitioner did not voluntarily waive his *Miranda* rights. (Tr 206)

LaCalle opined that given petitioner's low intelligence, his native fear of the police, his beating at arrest by the same people who were interrogating him, his lack of sleep, his earlier substance abuse and the length of the interrogation, petitioner's ability to understand what the police were telling him was very limited. His ability to resist the pressures of a very skillful interrogation was also very limited. (Tr 199-200) Given all that, LaCalle believed that petitioner was manipulated through adept and suggestive police questioning into admitting certain statements that were not true. (Tr 206-211, 222-24)

The trial court ruled that that petitioner's statements were voluntary. (Tr 231-34) The court advised defense counsel that it would not help to argue the Vienna Convention issue and summarily denied the motion to suppress on that basis. (Tr 231-32) A copy of the court's order denying petitioner's motion to suppress is attached at App 10-11.

Facts from Trial

Petitioner consumed a large quantity of alcohol. (Tr 381-84, 692-94) Around 3:00 a.m., he went to his girlfriend's duplex and repeatedly demanded to see her although her roommates repeatedly told him that she was not at home. (Tr 338-49, 355-59, 390-98) Petitioner threatened the roommates with one or two guns. *Id.*

At 3:11 a.m., two of the girlfriend's roommates called 911 from a pay phone at a nearby market. At least six police officers responded. (Tr 366, 453-54, 497) Uniformed officers Michael Strouse and Scott Clauson worked their way around the duplexes in the dark to an area at the back of the duplexes. (Tr 456-57, 477, 483, 764, 767-68) They saw a person crouched down, with his back to the officers, peeking around a duplex. (Tr 458, 768-69) It was petitioner. (Tr 459, 480)

Clauson shined his flashlight on petitioner, saw a gun in his hand, identified himself as a police officer and said, "Drop the weapon." (Tr 460, 769) At the moment Clauson shined his flashlight on petitioner, petitioner spun around and began firing his chrome Rossi .357 magnum revolver. (Tr 460-61, 769, 723-27, 732, 775) Strouse and Clauson fired back. (Tr 461-62, 770) Petitioner's bullet hit Clauson in the upper part of his leg, and he fell. (Tr 462, 465, 726, 735) According to Clauson, he was hit by petitioner's second or third shot. (Tr 770)

Strouse changed his location, shined his flashlight on petitioner and both men simultaneously fired at each other. (Tr 462-63) Something whizzed past Strouse's ear. (Tr 462-

63, 480) A bullet from the .357 magnum revolver was later recovered at about chest height from a nearby tree. (Tr 709, 724-25, 728) More shots were exchanged, and petitioner ran off. (Tr 463-64, 492)

The entire exchange of gunfire happened within 10 seconds. Although Strouse described the shooting as almost continuous, the other officers at the scene described the shooting as happening in two volleys. (Tr 459, 463, 484-86, 499, 534-35, 550, 563-64, 571-72) A police detective later questioned Clauson as to who had fired first: Clauson or petitioner. Clauson at first said that he was not sure. After the detective talked Clauson through the episode, Clauson said, "Well, I think he must have shot first." At the time of trial, Clauson was sure petitioner had fired first. (Tr 775-76; Exh. No. 101) All told, between 24 and 30 rounds had been fired. Petitioner had shot off five or six rounds and all from his chrome .357 magnum revolver. (Tr 485, 584-85, 719-20, 730, 771)

Strouse later spotted petitioner crouched down behind a duplex. (Tr 466) As soon as he was spotted, petitioner ran off. (Tr 466-67) Misty Senter's description of petitioner's actions in her backyard was essentially the same as her pretrial testimony. (Tr 433-44) Further testimony regarding petitioner's arrest was substantially similar to that given at the hearing on the motion to suppress. (Tr 435-40, 445-46, 468-71, 507, 536-59, 552-58, 566-69, 576, 578-79)

At the police station, a "drug recognition evaluator" evaluated petitioner and believed petitioner was under the influence of a stimulant, but not to the point where he was really high. (Tr 596, 599-600, 602-04) Blood and urine samples given at 8:52 a.m. tested positive for methamphetamine and amphetamine and showed that petitioner's blood alcohol content was .03 percent at that time. (Tr 594, 614)

Testimony regarding petitioner's extended interrogation was substantially similar to that given at the hearing on the motion to suppress and included additional statements. In those additional statements, petitioner consistently maintained that the police fired first and that he was not trying to kill them. However, he sometimes stated that he knew that he was shooting at police and sometimes stated that he did not know. (Tr 510-16, 522, 608, 610-16, 619, 622, 624, 627-29, 602-03, 630-72, 757-59; Exh. Nos. 41-45, 51, 62, 105)

The jury acquitted petitioner of resisting arrest. It found him guilty of all remaining charges except Count 1, attempted aggravated murder. On that count, it convicted him of the lesser crime of attempted murder.

Petitioner's Case on Appeal

On appeal, petitioner argued that his statements should have been suppressed under both the Oregon Constitution and the Fifth and Fourteenth Amendments to the United States Constitutions, because they were not voluntarily and knowingly made. He also argued that those statements should have been suppressed under the Fourteenth Amendment, because they were obtained in violation of the Vienna Convention. The Court of Appeals affirmed petitioner's convictions without opinion. *Sanchez-Llamas*, 191 Or App 399, 84 P.3d. 1133.

Petitioner made the same arguments before the Oregon Supreme Court. Relying heavily on a presumption against privately enforceable treaties and the State Department's interpretation that private rights do not exist, the court concluded that the Vienna Convention does not confer personally enforceable rights. *Sanchez-Llamas*, 338. Or at 276-77. It did not address petitioner's other claim regarding the voluntariness of his *Miranda* waiver and subsequent statements. *Id.* at 277.

REASONS FOR GRANTING THE WRIT

I. Petitioner's post-arrest statements were obtained in violation of the Vienna Convention and should be suppressed

A. Introduction

The Vienna Convention, 21 U.S.T. 77, T.I.A.S. No 6820, is a multilateral treaty to which both Mexico and the United States are signatories. The treaty was negotiated in 1963 and ratified by this country in 1969. In part, the Vienna Convention requires authorities to notify a detained foreign national of the detainee's right to consular access.

Petitioner is a Mexican national. Police arrested him but did not notify him of his Vienna Convention rights. He was subsequently interrogated for 11 hours and made incriminating statements. Police obtained those statements in violation of Article 36 of the Vienna Convention and the Due Process Clause of the Fourteenth Amendment.

This court granted review in an unrelated case concerning the Vienna Convention in *Medellin v. Dretke*, ___ U.S. ___, ___ S.Ct. ___, ___ L. Ed. 2d. ___, 2005 WL 1200824 (May 23, 2005). This court had granted review in that case to consider two questions: whether the *Avena* judgment was binding on American courts and whether this court should give effect to that judgment as a matter of judicial comity and uniform treaty interpretation. 2005 WL 1200824 at 1. Underlying those issues was the question of whether Article 36(1)(b) created judicially enforceable individual rights. *Id.* at 7 (O'Connor, J., dissenting).

Mr. Medellin was one of the cases considered by the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 1 (Mar 31). The ICJ held that he and others should be granted a review of their Vienna Convention claims in the American judicial system. Mr. Medellin eventually sought a writ of habeas corpus before this Court. In the mean time, President Bush withdrew from the Optional Protocol and

decided to grant Mr. Medellín review in Texas courts in accordance with the *Avena* judgment. This Court subsequently dismissed his petition, because he had sought relief in state court and because various procedural questions might prove to be hurdles to addressing the merits of his claims.

Although petitioner was not a party to the *Avena* case, this case raises the same question underlying *Medellin*: whether Article 36(1)(b) creates judicially enforceable individual rights. It further presents the question of what remedy, if any, applies when police obtain statements in violation of that article. Those questions were preserved below and come to this court on direct review. Therefore, procedural issues do not prevent this Court from considering the merits of petitioner's claims.

B. Article 36 is self-executing and constitutes the "law of the land"

The Supremacy Clause of the United States Constitution requires that courts enforce treaties as the "law of the land." Thus, treaty provisions are enforceable in American courts at the request of affected individuals if those provisions are self-executing. *United States v. Alvarez-Machain*, 504 U.S. 655, 667, 112 S.Ct. 2188, 119 L. Ed. 2d. 441 (1992) ("The Extradition Treaty has the force of law, and if * * * it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation."); *Edye v. Robertson ("Head Money Cases")*, 112 U.S. 580, 598-99, 5 S.Ct. 247, 28 L. Ed. 798 (1884) ("A treaty, then is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."); *United States v. Li*, 206 F.3d. 56, 70-71 (1st Cir.) (Torruella, C.J., dissenting in part), *cert den*, 531 U.S. 956 (2000).

The Vienna Convention is clearly self-executing. *See Medellin*, 2005 WL 1200824 at 15 (O'Connor, J., dissenting) ("Article 36 of the Vienna Convention ***, is, as the United States recognizes, a self-executing treaty.") It requires no implementing legislation to give it force. In addition, petitioner is not aware that the federal government has ever taken a contrary position. Consequently, petitioner will not discuss that point further. Rather, he will address whether the Convention conveys personal rights to foreign detainees.

C. The decisions of the ICJ concluding that individual rights exist under Article 36 should control as a matter of judicial comity and consistent treaty interpretation

In both *Avena* and *LaGrand*, the ICJ determined that Article 36 creates individual rights to consular notification and access. *LaGrand Case (Germany v. United States of America)*, 2001 I.C.J. 466, at ¶ 77 (June 2001); *accord, Avena*, 2004 I.C.J. at ¶ 61.

> "The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand * * *. Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Option Protocol, may be invoked in this Court * * *."

LaGrand, 2001 I.C.J. at ¶77. This court should follow those decisions.

Decisions of foreign courts are entitled to recognition and enforcement in the courts of the United States on the grounds of comity. In *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L. Ed. 95 (1895), the Court explained:

> "'Comity,' in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

Id. at 163-64.

The United States agreed to submit disputes "arising out of the interpretation and application" of the Vienna Convention to the ICJ. It fully litigated before that body in both the *Avena* and *LaGrand* cases. Under those circumstances, the United States courts should recognize and enforce those decisions.

This court should also follow the ICJ decisions in the interest of uniform treaty interpretation. One of the purposes of the Vienna Convention was to achieve uniformity among nations. *Report of the United States Delegation to the United Nations Conference on Consular Relations, reprinted in* Vienna Convention on Consular Relations and Optional Protocol, S. Exec Doc. # 91-9, 41 (1969). When a multilateral convention results from an effort to achieve uniformity, "it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently." *Olympic Airways v. Husain*, 540 U.S. 644, 660-61, 124 S. Ct. 1221, 157 L. Ed. 2d. 1146 (2004) (Scalia, j., dissenting). That objective would be thwarted if each nation were to insist upon its own interpretation of the treaty.

A treaty is like a contract – a multilateral contract in this case – in which parties agree to abide by certain terms. Here, the United States agreed to inform a foreign detainee of his or her right to consular access. In addition, the United States, along with Mexico, agreed under the Optional Protocol to be bound by the ICJ's decisions. The United States took full advantage of its opportunity to litigate before that court. Those countries that still adhere to the Optional Protocol will continue to be bound by the ICJ's interpretation of the treaty. *Avena*, 2004 I.C.J. at ¶ 151 (stating that the court will apply its interpretation and application in future cases). Consequently, the goal of uniformity will fail unless this court adopts the ICJ's interpretation.

In addition, the ICJ's interpretation of the treaty is supported by the principles of construction employed by this court. Therefore, there is no sound justification why this Court should depart from the well-reasoned decisions of the ICJ.

D. This court should interpret the treaty to provide individual rights

The construction of a treaty begins with the "'text of the treaty and the context in which the written words are used.'" *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534, 11 S.Ct. 1489, 113 L. Ed. 2d. 689 (1991) (quoting *Aktiengeseleschaft v. Schlunk*, 496 U.S. 694, 699, 108 S.Ct. 2542, 100 L. Ed. 2d. 722 (1988) (internal quotations in original). *See, Alvarez-Machain*, 504 U.S. at 663-68. General rules of construction may be applied to ambiguous passages. *Eastern Airlines*, 499 U.S. at 535. Treaties are construed more liberally than private agreements, and the courts may look to the history of the treaty, the negotiations, and the practical constructions adopted by the parties. *Id.*

Article 36 the Vienna Convention provides:

> "(1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> "(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> "(b) *if he so requests*, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights* under this sub-paragraph;
>
> "(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall

> also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. *Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.*
>
> "(2) The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

Vienna Convention, 21 U.S.T. at 100-01 (emphasis added).

Subparagraph (b) first provides that detaining authorities *must* notify the detainee's consulate without delay if "he [the detainee] so requests." Second, it provides that the same authorities must also forward any communication from the detainee to the consulate without delay. Third, it mandates that the detaining authorities inform the detainee without delay of "his rights," *i.e.*, the rights to notify consular representatives and communicate with them. The clear wording refers to the *detainee's rights*. Those rights may be exercised only at the detained person's election. Further, paragraph (1)(c) prohibits consular action if the detained person "expressly opposes such action."

The above language unequivocally articulates a rule by which the rights of individual citizen may be determined. The language is not ambiguous or difficult to understand. If it were a federal statute, there would be no doubt that Article 36 created individual rights.

However, some authorities have relied upon the treaty's preamble to suggest that no private rights were intended. *Li*, 206 F.3d. at 62. The preamble provides in part:

> "The State Parties to the present Convention,
>
> "* * * * *
>
> "Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of

> friendly relations among nations, * * * Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states,
>
> "* * * * *
>
> "Have agreed as follows."

23 U.S.T. at 3230.

The preamble refers to the privileges and immunities of diplomatic representatives in their roles as diplomatic representatives and does not limit the "rights" of private individuals. *Li*, 206 F.3d. at 72-73; Mark J. Kadish, "Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul," 18 *Mich. J. Int'l Law*, 565, 594-96 (1997) (hereinafter *Kadish*). The focus of the Vienna Convention was on consulate relations. *Kadish*, at 594-96. The "individuals" in the preamble are the individual consulate representatives. The preamble simply clarifies that the privileges and immunities granted consular officials under the Vienna Convention are meant to aid the consuls in the performance of their duties and should not be used by consuls as a shield to avoid punishment for wrongdoing. *Id.*

Although the United States Government does not dispute its duty to perform its obligations under Article 36, its litigation position is that the treaty confers no personal rights. *See e.g., LaGrand*, 2001 I.C.J. at ¶ 76. However, that position should be given little weight. Indeed, if the Executive Department's instant policy were the sole or even primary tool to construe a treaty, this Court would never truly construe a treaty, but merely defer to the executive construction, which would change with the political wind.

E. Police violated petitioner's rights under Article 36

Defense counsel's affidavit in support of the motion to suppress averred: "Petitioner is a foreign national and was not advised of his right to consult with the Mexican Counsel [sic]." (Rec

40; attached at App 3). The state agreed that petitioner was a Mexican citizen and that it failed to inform petitioner of his rights under the Vienna Convention. (Answer to Def's Mtn to Suppress, at p 2; Rec 72). Consequently, there is no dispute that petitioner was arrested and that the state did not comply with its Vienna Convention obligations.

F. Suppression is required under the United States Constitution

Suppression is not always required for nonconstitutional violations. *See United States v. Caceres*, 440 U.S. 741, 749, 99 S.Ct. 1465, 59 L. Ed. 2d. 733 (1979) (exclusion was inappropriate where agency's violation of its regulation did not implicate constitutional or statutory rights). However, this Court has upheld suppression where "the rules were designed 'to afford [the alien] due process of law' by providing 'safeguards against essentially unfair procedures.'" *Caceres,* 440 U.S. at 749 (quoting *Bridges v. Wixon*, 326 U.S. 135, 152-53, 65 S.Ct. 1443, 89 L Ed 2103 (1945)), *see United States v. Lombera-Camorlinga*, 206 F.3d. 882, 893 n 2 (9th Cir) (Thomas, J. dissenting, citing cases), *cert den*, 531 U.S. 991 (2000).

The purpose of suppression, at least in regards to illegal search and seizures, is to deter "future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona v. Evans*, 514 U.S. 1, 10, 115 S.Ct. 1185, 131 L. Ed. 2d. 34 (1995). "As with any remedial device, the rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously served." *Id.* at 11. Therefore, the circuit courts have sanctioned suppression of evidence as a remedy when there is a "deliberate disregard of the rule" or "if the petitioner was prejudiced." *Lombera-Camorlinga*, 206 F.3d. at 893 n 2 (quoting *United States v. Gantt*, 194 F.3d. 987, 994 (9th Cir 1999)).

A different standard, however, applies to the exclusion of confessions. In those situations, the remedy's roots lie in the common law. *Dickerson v. United States*, 530 U.S.

428, 433, 120 S.Ct. 1602, 147 L. Ed. 2d. 405 (2000) (citing cases and holding that warnings required under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d. 694 (1966) are constitutionally based). Suppression of tainted confessions is required under both the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment. *Dickerson*, 530 U.S. at 433. In more recent years, however, the Court has come to rely on the Due Process Clause. *Id.* at 434.

The federal circuit courts that have addressed Vienna Convention violations have not addressed whether the treaty confers personal rights. Instead, they have held that the suppression of statements is not an appropriate remedy because the treaty does not specifically require that remedy. *E.g.*, *United States v. Chaparro-Alcantara*, 226 F.3d. 616, 621-22 (7th Cir), *cert den*, 531 U.S. 1026 (2000); *Lombera-Camorlinga*, 206 F.3d. at 886-87; *Li*, 206 F.3d. at 61-62. Petitioner agrees that the Vienna Convention does not *explicitly* call for suppression. Instead, given the signatories' diverse political structures and systems of justice, paragraph 2 of Article 36 requires each country to integrate the treaty's requirements into that country's legal system.

Paragraph 36(2) requires that the laws of the receiving state give "full effect" to the purposes intended for the "rights" established under the treaty. That language is sufficient to require suppression of statements as a remedy for treaty violations because it is the only remedy provided by the laws of this country that would give "full effect" to the purposes of the treaty.

Violations of Article 36 should result in suppression of statements because those rights constitute procedural protections associated with interrogation and criminal prosecution. Therefore, they are akin to *Miranda* rights and serve similar purposes. *Miranda* warnings are required in order to even the playing field by ensuring that the suspect understands that he has a

right not to talk and a right to counsel. *Dickerson*, 530 U.S. at 435 (citing *Miranda*, 384 U.S. at 439, 445).

Article 36 also operates to safeguard against unfairness. Notification of the right to consular access is a procedural right granted to foreign nationals who suddenly find themselves enmeshed in an alien legal system. The right to contact one's consulate serves an obvious purpose. Because foreign nationals often have little or no knowledge of a receiving state's criminal system and principles, they are granted a right to contact their consulate without delay. That enables the consulate to assist the foreign national in understanding that system and arranging for legal representation if necessary. Mexico described its range of assistance in a letter it provided to the Joint Interim Committee of the Oregon State Legislature, and it attached that letter to the amicus brief that it filed in *State v. Chavez*, 335 Or. 44, 56 P.3d. 923 (2002) (letter attached to this petition at App 25-29). Because of the importance of consular notification to procedural fairness, petitioner is entitled to the suppression of his statements.

Petitioner is also entitled to suppression because of the egregious nature of the police misconduct. The treaty has been the law for over 35 years. However, violations continue to occur on a regular basis. The state's disregard for the treaty plainly illustrates why suppression is the most likely remedy to secure law enforcement's compliance with the treaty's terms. Unless and until consular notification and access is enforced by means of suppression, violations will continue to occur on a regular basis.

Petitioner is particularly entitled to the suppression of his statements given the lengthy and coercive nature of his interrogation and his limited abilities to understand the criminal justice system. As explained in Part II of this petition, given the totality of the circumstance the officers'

failure to properly advise petitioner of his rights under the treaty contributed to an involuntary and unknowing waiver of his Miranda rights and subsequent inculpatory statements.

II. Petitioner's statements were not voluntary and must be suppressed

The second question in this case presents the issue of whether defendant's statements should have been suppressed under the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner acknowledges that this court has examined the voluntariness of *Miranda* waivers under coercive circumstances in the past. However, this case presents that question in the unique light of the police failure to inform petitioner of his Vienna Convention rights to consular notification and access. Consequently, it presents a question of first impression.

A. The right to remain silent must be voluntarily and knowingly waived

The Fourteenth Amendment requires the state to prove by a preponderance of the evidence that a self-incriminating statement was voluntary, that is, that police conduct did not overbear the suspect's will or critically impair the suspect's capacity for self-determination. U.S. Const, Amend XIV; *Colombe v. Connecticut*, 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L. Ed. 2d. 1037 (1961)(if a suspect has voluntarily willed to confess, the statement may be used against him; if his will has been overborne or his capacity for self-determination critically impaired, the use of his confession offends due process and may not be used); *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L. Ed. 2d. 618 (1972)(the state must prove voluntariness by a preponderance of the evidence).

The totality of the circumstances determines whether a confession or admission is voluntary. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L. Ed. 2d. 302 (1991). The factors informing a voluntariness determination may be categorized into three groups: 1) the characteristics of the accused; 2) the conditions of interrogation; and 3) the conduct of law-

enforcement officials. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27, 93 S.Ct. 2041, 36 L. Ed. 2d. 854 (1973)(court will assess both the characteristics of the accused and the details of the interrogation). A confession must not be extracted by any threats of violence or obtained by direct or implied promises. *Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1485, 12 L. Ed. 2d. 653 (1964). Voluntariness is determined without regard to the truth of falsity of a confession. *Rogers v. Richmond*, 365 U.S. 534, 540-42, 81 S.Ct. 735, 5 L. Ed. 2d. 760 (1961).

Custodial interrogations, by their very nature, generate compelling pressures which undermine an individual's will to resist and compel him or her to speak. *Miranda*, 344 U.S. at 467. Under the Fifth Amendment, in order to establish that a suspect's in-custody statements are truly voluntary, the state must show two things: first, that the suspect was adequately and effectively apprised of his or her constitutional privilege against self-incrimination and right to counsel before interrogation and, if exercised, that the exercise of those rights were honored; and second, if waived, that the suspect knowingly and intelligently waived those rights. *Id.* at 467-77. The waiver must have been made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L. Ed. 2d. 410 (1986). The waiver is examined in the light of the totality of the circumstances. *Id.* Evidence that the suspect was threatened, tricked or cajoled shows that the suspect did *not* voluntarily waive his privilege. *Miranda*, 384 U.S. at 476; *Moran*, 475 U.S. at 421 (the relinquishment of the right must have been the product of a free and deliberate choice rather than intimidation, coercion or deception).

B. Petitioner's statements were not knowingly and voluntarily made

In this case, the evidence was uncontested that petitioner was a man of low intelligence who came from an area in Mexico where people greatly fear the police and do not believe that they can refuse to answer police questions. Petitioner, justified or not, was beaten by several police officers a few short hours before his interrogation. He was suffering from the effects of that beating during the interrogation. He was also "slurry", lethargic and "coming off" an alcohol binge and was deprived of sleep.

The entire interrogation lasted 11 hours – from about 3:30 a.m. when he was arrested to about 2:30 p.m. when he was jailed. Petitioner was in handcuffs the entire time. For most of the interrogation, except for a visit to the hospital, petitioner was confined to a small room with at least three officers. In the hospital, the questioning persisted between administrations of medical treatment.

The officers twice read petitioner his *Miranda* rights in Spanish, but the construction of the sentences required an 8th or 9th grade level of education to understand. Petitioner had poor language skills in his native language. At the start of the "heart" of the interrogation – beginning at 9:45 a.m. and continuing, with a short break for lunch, until 12:45 – a police officer told petitioner that the police "are going to find out anyway, so [it's] better that you talk now. Better than * * * later, they go after you more, ok?"

Petitioner proved very suggestible during the interrogation. His story changed continually. For the most part, the police only let go of a line of questioning after petitioner had agreed to their version of the events. Petitioner even admitted to a version of the events that later-acquired police evidence disproved: that petitioner shot both of his guns and not just one.

Midway through this last phase of the interrogation, the police asked petitioner to describe his rights. He described his rights as follows, "that it would be better if I told the truth and everything." That is by no means an accurate description of his *Miranda* rights. When asked if the police had frightened him, petitioner said, "Yes, that, that, that, I was going to, to be, ah, locked up longer. That's what I remember that you told me, right? That, that, that I was going to have more, more trouble, that's all * * * if, if, if I didn't tell the truth, you told me." Petitioner was obviously referring to the police officer's statement that the police "are going to find out anyway, so [it's] better that you talk now. Better than * * * later, they go after you more, ok?"

In addition, police violated petitioner's rights under the Vienna Convention. That police misconduct should weigh heavily against finding a voluntary and knowing waiver. The failure to advise petitioner of his rights to contact and communicate with his consulate disavailed petitioner of the very procedures that were established to ensure that he understood his rights in the American criminal justice system.

Given the totality of the circumstances, petitioner did not understand and voluntarily waive his *Miranda* rights and did not voluntarily give statements to the police.

C. Prejudicial Error Analysis

The admission of coerced confessions obtained in violation of the Fifth Amendment is subject to a harmless error analysis. *Fulminante*, 499 U.S. at 310. Before the constitutional error can be held harmless, the state must show, beyond a reasonable doubt, that the admission of the confession did not contribute to the petitioner's conviction. *Id.* at 310-12. An appellate court should keep in mind that a confession is probably the most probative and damaging evidence, that the impact on the jury is great and that a jury may be tempted to reach its decision by relying on that evidence alone. *Id.* at 296.

In this case, there is no question as to whether or not petitioner shot at the police officers and wounded one of them. He did. The issue at trial was petitioner's intent when he did so.

By the time the interrogating police officers were done with petitioner, he had made some damaging admissions. He admitted knowing the police were in the area looking for him. He admitted that he was lying in wait with a gun in his hand. He admitted that if the officers were going to shoot at him, he was going to shoot back. He admitted knowing that it was the police he was shooting at. He admitted shooting "straight ahead."

That evidence surely tipped the scales in favor of petitioner's convictions. It disproved any reckless intent. It made petitioner out to be a killer. And if the jury spared him a conviction of attempted aggravated murder on Count 1 because it did not believe that petitioner immediately knew he was shooting at police, the evidence ensured petitioner's conviction of attempted murder of that officer and of attempted aggravated murder of the second officer at whom petitioner shot just seconds later. Further, that evidence ensured petitioner's conviction for assault in the first degree.

It cannot be said then that the admission of petitioner's involuntary statements was harmless beyond a reasonable doubt. The trial court's error was prejudicial error. It warrants the reversal of petitioner's convictions for attempted murder, attempted aggravated murder and assault in the first degree.

CONCLUSION

The petition for writ or certiorari should be granted. With respect to both issues presented in this petition, petitioner requests that this court remand to the Oregon Supreme Court with instructions to suppress his statements and remand his case for a new trial.

Respectfully Submitted,

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IN THE CIRCUIT COURT FOR THE STATE OF OREGON FOR JACKSON COUNTY

STATE OF OREGON, Plaintiff, vs. MOISES SANCHEZ-LLAMAS, Defendant	Case No.: Case No.: 99-6212-FE MOTION TO SUPPRESS

1.

Defendant requests oral argument and anticipates the taking of evidence and argument on this motion will take one day.

2.

Defendant moves the court for an order suppressing all observations of the accused, statements, admissions or confessions of the accused, and the fruits thereof, upon the following grounds:

1. That the same were obtained in violation of applicable state statutes, the Constitution of Oregon, and the Constitution of the United States;
2. The lack of voluntariness under the Oregon Constitution and United States Constitution.

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Defendant relies in this motion upon ORS 136.425 (1), Article I, section 12. of the Oregon Constitution and the Fifth Amendment, United States Constitution.

Dated this 19th day of September, 2000

Robert L. Abel OSB #70001
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IN THE CIRCUIT COURT FOR THE STATE OF OREGON FOR JACKSON COUNTY

STATE OF OREGON, Plaintiff, vs. MOISES SANCHEZ-LLAMAS, Defendant	Case No.: Case No.: 99-6212-FE AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS

THE STATE OF OREGON)
)ss.
County of Jackson)

I, Robert L. Abel, being first duly sworn on oath, do hereby depose ands say:

I am the attorney for the above named defendant.

I have read the police reports and talked with the defendant regarding the facts and circumstances surrounding the interrogation conducted by police officers on December 18,2000.

Based on information and belief from these sources, the facts and circumstances relevant to this Motion to Suppress are as follows:

1. Defendant is a foreign national and was not advised of his right to consult with the Mexican Counsel;
2. Defendant was not properly advised of his Miranda rights;
3. Statements of the defendant were not made voluntarily.

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I make this affidavit in support of my motion to suppress.

Dated this 19th day of September, 2000

Robert L. Abel OSB #70001
Attorney for Defendant

SUBSCRIBED AND SWORN TO before me this 19th day of September 2000.

OFFICIAL SEAL
STEVE CHASE
NOTARY PUBLIC - OREGON
COMMISSION NO. 302656
MY COMMISSION EXPIRES JULY 2, 2001

Notary Public for Oregon
My Commission Expires 7/2/01

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IN THE CIRCUIT COURT FOR THE STATE OF OREGON FOR JACKSON COUNTY

STATE OF OREGON, Plaintiff, vs. MOISES SANCHEZ-LLAMAS, Defendant	Case No.: Case No.: 99-6212-FE MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS

I.

DEFENDANT, A FOREIGN NATIONAL, WAS NOT ADVISED OF HIS RIGHT TO CONSULT WITH THE MEXICAN COUNSEL

Article 36 of the Vienna Convention on Consular Relations and Optional Protocol on Disputes, April 24, 1963, 21 U.S.T. 77-123 (1970), T.I.A.S. No. 6820 (hereafter "the Convention") provides:

"Article 36

"COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE

"1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

> "(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> "(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication

addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

"(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody, or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

"2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

The Vienna Convention was signed by the United States in Vienna in 1963 and ratified on September 24, 1969, taking effect on December 24, 1969. 115 Cong.Rec. 30,945 (1969). The regulations of the Immigration and Naturalization Service provide that "[e]very detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality," and that, for some nationalities, the consul be immediately notified when a foreign national is detained by local authorities. 8 C.F.R. § 242.2(g) (1997). This section was enacted to ensure compliance with Article 36 of the Convention. United States v. Calderon-Medina, 591 F.2d 529, 531-32 n.6 (9th Cir. 1979).

The Supremacy Clause, Article VI of the United States Constitution, provides that

"[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding" (Emphasis added).

The United States Supreme Court has stated that "[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 L.Ed.2d 765 (1982), quoting Maximov v. United States, 373 U.S. 49, 54, 83 S.Ct. 1054, 1057 (1963). Furthermore, "[i]t is axiomatic that the State must adhere to United States treaties as the supreme law of the land."

Arteaga v. Texas Department of Protective and Regulatory Services, 924 S.W.2d 756, 761 (Tex.App.-Austin 1996). (citing to Supremacy Clause).

The drafters of the Article 36 were clearly concerned with the ability of consular officers to speak with nationals of the sending State imprisoned in the jurisdiction of the receiving State. Sub-paragraph (1)(a) provides a general right of communication with nationals of the sending state. Sub-paragraph (1)(b), however, requires competent authorities who have been notified to do so to inform the consular post if foreign nationals are "detained in any . . . manner," to forward communications between the national and the consul, and to so inform the national. Sup-paragraph (1)(c) allows consular officials to visit, converse and correspond with the detained nationals, and to arrange for the national's representation.

Consequently, the text and context of Article 36 implicate rights similar to those which led the Supreme Court to hold that, because a criminal defendant may not know of his constitutional right to an attorney, the police must inform the accused of that right so that he may knowingly exercise or waive that right once taken into custody. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). A foreign national is particularly in need of such advice. A foreign national accused of crime may be deported if convicted. Legal systems and the availability of legal protections may differ wildly from those of the sending State. The national may not even speak the language of the receiving State, thus being doubly disadvantaged. Article 36 alleviates this problem by requiring the police to notify the accused of his right to speak with consul, and to notify the consul of the national's detention. Article 36 allows the consul, a person the accused may be more able to trust, to speak with the accused. The foreign national can get information, from a fellow native speaker, regarding the differences between the two legal systems. Defendants from countries with authoritarian regimes may fear their own torture, murder, or retaliation for not cooperating. Thus, common police practices such as feigning anger, raising the voice, cursing, the wearing of weapons, and isolation of the subject in an interrogation room may invoke a quite reasonable terror in a foreign national. Furthermore, language difficulties may prevent the foreign accused from knowingly exercising his or her Miranda rights.

The remedy for a violation of a foreign national's right to be informed of the ability to speak with consul should be suppression. Cf. Montilla v. INS, 926 F.2d 162, 170 (2nd Cir. 1991) (invalidating deportation proceeding appropriate remedy where constitutional or statutory right implicated) with Waldron v. INS, 17 F.3d 511, 518

(1993) (affirming deportation proceeding appropriate remedy where no prejudice results from violation of administrative rule). The Due Process provisions of the Fifth Amendment of the United States Constitution apply to foreign nationals. See Montilla, 926 F.2d at 166. The Supremacy Clause provides that the Constitution, statute, and treaties of the United States are the supreme law of the land. Consequently, the treaty at issue herein is more like a statutory or constitutional right than the INS regulation at issue in Waldron.

Similarly, exclusion of evidence is the proper remedy for a violation of a person's constitutional rights. Weeks v. United States, 232 U.S. 383, 393, 34 S.Ct. 341, 58 L.Ed. 652 (1914) (excluding evidence appropriate remedy for violation of 4th Amendment protection against unreasonable searches); Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967) (excluding underlying, invalid conviction appropriate remedy for violation of 6th Amendment right to counsel).

"This nation must manifest integrity in our treaties with foreign countries. To honor the provisions of Article 36 of the [Convention] . . . mandates a sense of justice and decency. To do anything less is a severe erosive compromise of our very essence equal if not greater than a Constitutional violation." United States v. Calderon-Medina, 591 F.2d 529, 532 (1979) (Takasugi, J., dissenting).

II.

The Defendant, Moises Sanchez-Llamas, seeks to have the Court exclude from evidence herein all statements, admissions and confessions elicited from him during the course of questioning by police officers on December 18, 1999. Defendant argues that he made the statements involuntarily and without knowingly and intelligently waiving his Miranda rights and, accordingly, the state's use of the statements violated Article I, section 12, of the Oregon Constitution and the Fifth Amendment. Defendant further argues the confession or admissions are inadmissible under the provisions of ORS 136.425 (1).

Defendant is a Mexican National who speaks no English. On December 18, 1999 at approximately 3:30 a.m. he was arrested at or near Columbus Avenue, Medford, Oregon. His arrest followed the shooting of a Medford Police Officer.

During the course of the arrest the defendant suffered physical injuries. Evidence will also establish that he had consumed alcohol and used methamphetamine. The defendant was questioned by various officers from 3:45 a.m. to 12:45 p.m. on December 18, 1999.

In State v. Cochran, 72 Or. App. 499, 512 the Court states:

"The fundamental test of admissibility is whether defendant's actions were voluntary. Schneckloth v. Bustamonte, 412 U.S.218 (1973). It is the state's burden to prove that defendant's actions were voluntary by the clear weight of the evidence. State v. Burdick, 57 Or. App. 601 (1983). No single test of voluntariness is determinative; a court must consider the 'totality of the circumstances'."

When considering whether or not a waiver is valid, (i.e. voluntary, knowing, and intelligent) factors such as the defendant's age, education, intelligence, cognitive functioning, mental state, length of detention, coerciveness of police, and the defendant's knowledge of the right to refuse consent, must be examined within the context of culture and language.

In State v. Corona, 60 Or. App. 500, 506 the court stated:

"The analysis of voluntariness of a confession and voluntariness of a waiver of rights is the same. State v. Foster, 288 Or. 649 (1980). The proper inquiry regarding intoxication is whether 'by reason of extreme intoxication a confession cannot be said to be the product of a rational intellect and free will.' "

This same analysis would apply to any of the factors set forth in the preceding paragraph. In the instant case the Defendant speaks no English, was physically beaten during the process of arrest, interviewed over a period of nine hours by several different officers, including three Spanish speaking translators. The officers used well know manipulating techniques such as implanting statements, and circular techniques in which the same question is asked again and again in the span of several hours. The defendant has a very limited education and a low functional IQ.

Respectfully submitted.

Dated this 17th day of September, 2000.

Robert L. Abel OSB #70001
Attorney for Defendant

ENTERED AND FILED

App 10
2000

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

STATE OF OREGON, Plaintiff, v. MOISES SANCHEZ-LLAMAS Defendant.	NO. 99-6212-FE FINDINGS AND ORDER ON MOTION TO SUPPRESS

THIS MATTER having come before the Court for hearing on defendant's Motion to Suppress on November 16, 2000, the State appearing by Mark Huddleston, District Attorney, and defendant appearing personally and with his attorney, Robert L. Abel, and the Court having heard testimony from Detectives Terry Newell and Bill Ford of the Medford Police Department, Officers Michael Strouse and Curtis Whipple of the Medford Police Department, Medford Police Community Service Officer Arturo Vega, Nurse Betty Martinez, Dr. Jeffrey William, Mercy Flights EMT Susan Shelters and Clinical Psychologist Dr. Jose LaCalle, and the Court having examined the exhibits offered and having heard statements of counsel and being fully advised in the premises, hereby finds

1. That any violation of the Vienna Convention that may have occurred in this case does not require suppression of the defendant's statements;

2. The Court finds by clear and convincing evidence that defendant understood his Miranda rights and knowingly, intelligently and voluntarily waived his right to remain silent

JACKSON COUNTY DISTRICT ATTORNEY
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and to have an attorney present during questionining;

3. The court finds by clear and convincing evidence, given the totality of the circumstances, that the defendant's statement was voluntary.

Accordingly, defendant's Motion to Suppress is denied in its entirety.

DATED this 1 day of Dec., 2000.

R. W. White
Circuit Court Judge

cc: Robert Abel

ENTERED AND FILED

2000

JACKSON COUNTY DISTRICT ATTORNEY
Criminal Division • 715 West 10th St.
Medford, OR 97501 • (541) 774-8181

CAPTION(Rev 1/00)

CASES AFFIRMED WITHOUT OPINION

(84 P3d 1133)

January 7, 2004

City of Eugene v. Biersdorff et al and Lane County and Boler et al (A119418)
Downs, Elizabeth Diane v. McGee (A118454), *rev den*, 336 Or 615
Hartford v. Department of Human Services (A120738)
In the Matter of Armstrong, Josh, Alleged to be a Mentally Ill Person. State v. Armstrong, Josh (A120370)
In the Matter of the Suspension of the Driving Privileges of Carpenter, Cory v. Oregon Department of Transportation, Driver and Motor Vehicle Services Division (DMV) (A120410), *rev den*, 336 Or 534
Kamph, John Everett v. Lampert (A118256)
May v. Burdick (A117744)
State v. Sanchez-Llamas, Moises (A114418)
State v. Thomas, Dee Swiss, IV (A117881-84), *rev den*, 336 Or 657
Stull v. Lewis & Clark College et al (A113988)

January 14, 2004

Brodkey v. Employment Department et al (A119968)
Davidson v. Clatsop County (A115059)
In the Matter of Herrick, Noah and Herrick, Austin, Minor Children. State ex rel Juvenile Department of Multnomah County v. Herrick-Carlson (A121889), *rev den*, 336 Or 615
In the Matter of Sullivan, Sonya M., Alleged to be a Mentally Ill Person. State v. Sullivan, Sonya M. (A118997)
In the Matter of the Compensation of Gomez, Christopher D., Claimant. Gomez v. Liberty Northwest Insurance Corporation et al (A119320)
In the Matter of the Marriage of Murphy and Murphy (A120087)
In the Matter of Zongor, Dorothea Rose, Alleged to be a Mentally Ill Person. State v. Zongor, Dorothea Rose (A117920)
State v. Butterfield, Brian Ken (A118098)
State v. Cechmanek, Earl Joseph (A119068)
State v. Sweet, Izear (A116731)
State v. Wright, James Dean (A115345-47)
State v. Zastera, Jerry Lee (A114282/83)

PETITIONS FOR REVIEW

(93 P3d 71)

ALLOWED

May 18, 2004

Bryant v. Walker (A118386)(S51067)(190 Or App 253), *dismissed as improvidently allowed*, 337 Or 585
State v. Sanchez-Llamas, Moises (A114418)(S51289)(191 Or App 399)

DENIED

May 18, 2004

Castellano, Patrick R. v. Schiedler (A117616)(S51354)(192 Or App 602)
Castle, Jeffrey Lynn v. Palmateer (A120401)(S51318)(192 Or App 602)
Hammer v. Clackamas County (A122139)(S51249)(190 Or App 473)
Hertel v. Marquis Companies I, Inc. (A120351)(S51251)(192 Or App 162)
Johnson, Cary Joseph v. Lampert (A115085)(S51277)(190 Or App 304)
Kamph, John Everett v. Lampert (A118256)(S51334)(191 Or App 399)
Liberty Northwest Insurance Corporation v. Kemp (A118217)(S51275)(192 Or App 181). Balmer and Kistler, JJ., would allow.
McLean v. Charles Ellis Realty, Inc. (A112916)(S51143)(189 Or App 417)(petition of Lemke)
McLean v. Charles Ellis Realty, Inc. (A112916)(S51144)(189 Or App 417)(petition of McLean)
McLean v. Charles Ellis Realty, Inc. (A112916)(S51189)(189 Or App 417)(petition of Charles Ellis Reality, Inc., and Jensen)
Phiffer, Billy Ray v. State of Oregon (A117527)(S51269)(191 Or App 306)
State ex rel Department of Human Services v. Lind (A122225)(S51315)(192 Or App 362)
State ex rel Department of Human Services v. Smith (A119798)(S51293)(190 Or App 570), *denial withdrawn and review allowed*, 337 Or 247
State ex rel Juvenile Department of Multnomah County v. Atterberry (A119552) (S51306)(191 Or App 305)
State v. Basargin, Joseph Savin (A117904)(S51303)(192 Or App 487)
State v. Biagi, Anthony (A118460)(S51286)(190 Or App 399)
State v. Boyd, William Chandler, Jr. (A118957)(S51245)(192 Or App 163)
State v. Gannon, Greg Joseph (A118840)(S51364)(192 Or App 603)
State v. Herrera-Perez, Armando (A113877)(S51322)(191 Or App 654)
State v. Jones, Suzan Anne (A116975)(S51340)(192 Or App 487)
State v. Jones, William Lee, III (A118173)(S51307)(191 Or App 654)
State v. Linville, Richard Abe (A116335)(S51314)(190 Or App 185)
State v. Martinez, Jennie (A118033)(S51333)(191 Or App 653)
State v. Matlock, Tommy L. (A118822)(S51324)(192 Or App 163)
State v. Miles, Suzanne (A117376)(S51332)(191 Or App 654)
State v. Nale, Henry Paul (A118956)(S51337)(192 Or App 673)
State v. Nunley, Walter D. (A119187)(S51230)(191 Or App 653)
State v. Peck, Michael Ari (A117560)(S51254)(192 Or App 364)
State v. Rivera, Timothy (A117982)(S51355)(192 Or App 362)
State v. Umtuch, George M., III (A117313)(S51341)(192 Or App 364)
State v. Westfall, Lance M. (A115193)(S51326)(192 Or App 487)
Stryffeler, Darold Allen v. Lampert (A113298)(S51308)(192 Or App 363)
White v. Vocational Rehabilitation Services (A118504)(S51120)(191 Or App 306)

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent on Review,
v.
MOISES SANCHEZ-LLAMAS,
Petitioner on Review.
(CC 996212FE; CA A114418; SC S51289)

En Banc

On review from the Court of Appeals.*

Argued and submitted November 4, 2004.

Susan Fair Drake, Senior Deputy Public Defender, Salem, argued the cause and filed the brief for petitioner on review. With her on the brief were Peter A. Ozanne, Executive Director, and Peter Gartlan, Chief Defender, Office of Public Defense Services.

Mary H. Williams, Solicitor General, Salem, argued the cause and filed the brief for respondent on review. With her on the brief was Hardy Myers, Attorney General.

GILLETTE, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

* Appeal from Jackson County Circuit Court, Raymond B. White, Judge. 191 Or App 399, 84 P3d 1133 (2004).

GILLETTE, J.

In this criminal case, defendant contends that the trial court committed reversible error by refusing to suppress his post-arrest statements to the police. The Court of Appeals affirmed the judgment of the trial court. *State v. Sanchez-Llamas*, 191 Or App 399, 84 P3d 1133 (2004). We allowed defendant's petition for review to consider his contention that the police violated his right to consular notification and communication, as guaranteed by Article 36 of the Vienna Convention on Consular Relations (VCCR),[1] and that suppression of his post-arrest statements is the necessary and appropriate remedy for that violation.[2] As we explain below, we conclude that Article 36 of the VCCR does not create rights that individual foreign nationals may assert in a criminal proceeding. Accordingly, we affirm the judgment of the trial court and the decision of the Court of Appeals.

Defendant is a Mexican national. He was arrested in December 1999 after an incident in which he exchanged gunfire with police officers and wounded one officer in the leg. Shortly after defendant's arrest, the police read him *Miranda* warnings in English and Spanish. The police did not inform defendant at that time, or at any time thereafter, that he had any "right" under Article 36 of the VCCR to communicate with the Mexican consulate and to have the consulate informed of his arrest. Neither did the police inform the Mexican consulate of defendant's arrest.

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[1] As we explain more fully later in this opinion, the VCCR is a multilateral treaty that purports to define the functions of a consulate and govern the establishment of consular relations between the signatory nations. *See United States v. Emuegbunam*, 268 F3d 377, 388 (6th Cir 2001), *cert den*, 535 US 977 (2002) (describing treaty). As we explain elsewhere, defendant is a Mexican national. The United States and Mexico both are signatories. Generally, Article 36 of the VCCR requires "competent authorities" to inform the relevant consulate when a foreign national is arrested and to allow the consulate to communicate with the detained foreign national and vice-versa. Article 36 also requires authorities to advise detained foreign nationals "without delay" of those "rights."

[2] Defendant asserts an alternate theory for suppression, *viz.*, that the circumstances surrounding his arrest and detention show that his post-arrest statements, including his purported waiver of his *Miranda* rights, were not made voluntarily. However, we elect to limit our review to the issue that defendant raises under the VCCR. *See* ORAP 9.20(2)(court's opinion on review need not address all questions raised by petition).

The police proceeded to interrogate defendant, who eventually made a number of incriminating statements. Later, defendant was charged with attempted murder, attempted aggravated murder, and various other crimes. Before his trial on those charges, defendant moved to suppress his post-arrest statements to the police on the ground, *inter alia*, that the police had failed to inform him of his "rights" under the VCCR to consular access and notification. The trial court denied the motion, ruling, with respect to defendant's argument under the VCCR, that "any violation of the Vienna Convention that may have occurred * * * [did] not require suppression of defendant's statements." Defendant subsequently was convicted of 11 felony counts and sentenced to a total of 246 months in prison. As noted, the Court of Appeals affirmed the convictions and sentences on defendant's direct appeal.

Before this court, defendant continues to assert that his post-arrest statements should have been suppressed in order to vindicate his rights under Article 36 of the VCCR. The state responds that that claim fails for at least two reasons: (1) Article 36 of the VCCR does not confer individual rights that a detained foreign national may assert in a criminal proceeding; and (2) even if Article 36 did confer such rights, suppression of post-arrest statements to the police would not be the appropriate or required remedy for their violation. We focus, in this opinion, on the first argument.

We begin with the VCCR itself—a multilateral treaty that the United Nations adopted in 1963 and that the United States Senate ratified in 1969. Among its 79 articles is Article 36, which provides, in part:

> "(1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> "(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> "(b) if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a

> national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
>
> "* * * * *
>
> "(2) The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

VCCR, Art 36, 21 UST 77, 100-01.

Defendant contends that subparagraph (1)(b) above clearly creates an individual right of consular access and notification, including a personal and enforceable right to be advised "without delay" of those rights. Defendant notes, in that regard, that the provision expressly makes consular notification a matter of personal election by the foreign national who is detained: It requires authorities to notify the detainee's consulate only "if [the detainee] so requests."[3] Defendant points out, also, that subparagraph (1)(b) explicitly refers to "rights" of consular notification and access, and describes those rights as belonging to the detained individual ("[t]he said authorities shall inform the person concerned without delay of *his* rights under this subparagraph" (emphasis added)).

Defendant further contends that, as a ratified treaty, the VCCR is a part of the "supreme law of the land"

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[3] Defendant notes that another subparagraph of Article 36 that is not included in the quoted material above also makes consular *assistance* a matter of personal election by the person detained: Under subparagraph (1)(c) of Article 36 consular officers must refrain from acting on behalf of a detained national "if he expressly opposes such action."

and, as such, stands on equal footing with laws that the national legislature has enacted.[4] In defendant's view, that means that Article 36 is enforceable by affected individuals in the same way and to the same extent as any federal statute would be. With respect to that latter point, defendant appeals to the "doctrine of self-execution"—the idea that certain international treaties are "self-executing," that is, immediately effective and enforceable by individuals without additional implementing legislation.

However, that is an issue of federal law, and the federal cases suggest that treaties are "self-executing," in the sense of permitting enforcement by an individual right of action, only when a specific intent to create such individual rights can be discerned from the treaty as a whole. *See, e.g.*, *Edye v. Robertson*, 112 US 580, 598-99, 5 S Ct 247, 28 L Ed 798 (1894) ("Head Money Cases") ("A treaty * * * is a law of the land as an act of Congress is, *whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined*." (emphasis added)); *Goldstar (Panama) S.A. v. U.S.*, 967 F2d 965, 968 (4th Cir 1992) ("Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action.").[5] In fact, the general rule, widely recognized in the federal courts, is that rights created by international treaties belong to the signatory state and are *not* enforceable in American courts by private individuals. Thus, the United States Supreme Court has stated:

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[4] So far as it goes, defendant's point in that regard is unassailable. Article VI of the United States Constitution provides, in part:

> "This Constitution, and the Laws of the United States * * * and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

(Emphasis added.) Thus, as a ratified treaty, the VCCR is a part of the "supreme law of the land." But this case is not about the status *of* the VCCR; it is about defendant's status as an arrested national of a signatory state *under* the VCCR.

[5] In fact, it is at least arguable that the question whether a treaty is "self-executing"—enforceable without additional legislation—is different from the question whether it is individually enforceable in a judicial proceeding. *See U.S. v. Li*, 206 F3d 56, 67 (1st Cir 2000) (Selya and Boudin, JJ., concurring) (asserting that the two questions are different).

> "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress. * * * It is obvious that with all this the judicial courts have nothing to do and can give no redress."

Edye, 112 US at 598. *See also Foster v. Neilson*, 27 US (2 Pet) 253, 306, 7 L Ed 415 (1829), *overruled in part on different grounds*, *U.S. v. Percheman*, 32 US 51 (1833) ("The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided."); *Goldstar (Panama) S.A.*, 967 F2d at 968 ("International treaties are not presumed to create rights that are privately enforceable.").

The rationale for the foregoing general rule (which in substance amounts to a presumption *against* the creation of individual, judicially enforceable rights) is obvious. The United States Constitution separates the various functions of government among the three branches, generally placing the powers that relate to foreign relations in the Executive Branch (with certain oversight powers, including the power to ratify treaties, in the Legislative Branch). The necessary and beneficial corollary of that constitutional arrangement is that, in matters of international relations, the nation speaks through a single authoritative voice—the president. That beneficial effect, and the separation of powers principle itself, would be undermined if the Judicial Branch were to presume to enforce treaty provisions on behalf of individuals when its authority to do so is less than clear.[6]

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[6] The concurring judges in *Li* aptly described the "mischief" that could result from allowing individuals to seek redress through the courts when the Executive Branch has not intended or contemplated that result:

> "There is an elaborate regime of practices and institutions by which the United States and other nations enforce commitments *inter sese* or decide that, in the national interest, promises given by or to another sovereign should not be enforced in a specific case. Sometimes this is done purely for reasons of prudence, sometimes for convenience, or sometimes to secure advantage in unrelated matters. Incalculable mischief can be wrought by gratuitously introducing into this often delicate process court enforcement at the instigation of private parties."

In acknowledging the foregoing general rule, we do not mean to say that a court never can read a treaty to create privately enforceable rights. Certainly, the noted presumption can be overcome by explicit wording and even by provisions that necessarily imply a private right of judicial enforcement. For example, courts have allowed individuals judicially to enforce treaties that govern the rights of foreign nationals to inherit property, despite the absence of explicit treaty wording providing for such individual enforcement, most likely because the right-granting wording in those treaties makes sense only if it is read to confer an individually enforceable right. *See, e.g.*, *Clark v. Allen*, 331 US 503, 507-08, 67 S Ct 1431, 91 L Ed 1633 (1947) (dealing with such a treaty). On the other hand, an individual right of judicial enforcement will not be inferred from the mere fact that a treaty sets out substantive rules of conduct that, if honored, would benefit individuals. *See, e.g.*, *Argentine Republic v. Amerada Hess Shipping*, 488 US 428, 442, 109 S Ct 683, 102 L Ed 2d 818 (1989) (holding that Geneva Convention on the High Seas, which provides that illegally boarded merchant ship "shall be compensated for any loss or damage that may have been sustained," does not create private right of action for foreign corporations to recover compensation in United States courts); *United States ex rel Lujan v. Gengler*, 510 F2d 62, 67 (1975), *cert den*, 421 US 1001 (1975) ("[E]ven where a treaty provides certain benefits for nationals of a particular [signatory] state—such as fishing rights—it is traditionally held that 'any rights arising from such provisions are, under international law, those of the [signatory] states and * * * individual rights are only derivative through the [signatory] states.' ") (quoting *Restatement (Second) of the Foreign Relations Law of the United States* § 115, comment e (1965)).

With those considerations in mind, we turn to defendant's proposed interpretation of Article 36 of the VCCR. Although defendant is correct that Article 36 expressly refers to the detained foreign national's "rights" to consular access and notification, the mere use of the term "rights" cannot, by

206 F3d at 68 (Selya and Boudin, JJ., concurring.) Those comments would apply with even more force to the prospect of uneven enforcement in the various state courts.

itself, support an intent to require signatory states to allow individual detainees to enforce those "rights" in a criminal proceeding against them—particularly when the treaty does not specify the nature of the declared "rights" or any remedy that is required for their breach. In fact, it seems likely that the treaty refers to a detainee's "rights" to consular access and notification purely because that is the most convenient and comprehensible way of describing what a receiving signatory state must tell a foreign detainee in order to meet the signatory state's obligations under the treaty. *See U.S. v. Li*, 206 F3d 56, 66 (1st Cir 2000) (Selya and Boudin, JJ., concurring) (making that point).

Neither does any other wording in the treaty suggest an intent to create individual rights that are enforceable in a judicial proceeding. In fact, the purposes stated in the preamble (to "contribute to the development of friendly relations among nations") and in the initial clause of Article 36 ("with a view to facilitating the exercise of consular functions relating to nations of the sending state") both suggest that the treaty and Article 36 are concerned with relationships and obligations among *nations*, not with individual rights.[7]

Finally, there is nothing about the subject matter of the VCCR that would compel an inference that a private right of action was intended. In that regard, we think it is perfectly reasonable to read the treaty as leaving enforcement of Article 36 entirely to the signatory states.

We have described a general presumption that international treaties speak only to the rights and obligations of signatory states and do not confer individual rights that are

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[7] At the same time, we note in passing that we are unimpressed by the state's contention that the Preamble to the VCCR contains a clear *denial* of an intent to create individual rights. The state focuses on the following wording:

> "Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems, *[and r]ealizing that the purpose of such privileges and immunities is not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective states."

VCCR, 21 UST at 79 (emphasis added). It is at least arguable that the emphasized clause refers to privileges and immunities of individual consular officials and that, as such, it says nothing about the rights of individual foreign detainees.

enforceable in judicial proceedings. We also have noted that, although Article 36 of the VCCR loosely refers to a foreign detainee's "rights" to consular access and notification, it contains no explicit statement or clear implication of an intent to depart from that general rule. In the absence of any such clear indication to the contrary, we must conclude that the obligations that Article 36 describes are enforceable only by the affected signatory states and not by individual detainees.

That conclusion is confirmed by the fact that, since at least 1970, the State Department has maintained that the VCCR does not create enforceable individual rights and that "the only remedies for failures of consular notification under the [VCCR] are diplomatic, political, or exist *between [signatory] states* under international law." *Li*, 206 F3d at 63-64 (emphasis supplied); *U.S. v. Emuegbunam*, 268 F3d 377, 392 (6th Cir 2001) (citing *Li*).[8] The State Department's interpretation of any international treaty is entitled to substantial weight, because that department of the federal Executive Branch is responsible for negotiating and administering treaties, and also because it generally is the "single authoritative voice" through which the Executive Branch speaks. *Li*, 206 F3d at 67 (Selya and Boudin, JJ., concurring).[9]

We conclude that Article 36 of the VCCR does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding. It follows that defendant's suppression motion in the present case, grounded in the theory that the police had violated his

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[8] It also is confirmed by the fact that, of the one hundred plus nations that have signed the VCCR, none apparently provides an individual remedy through its criminal justice system for violations of the sort that is at issue here. *Emuegbunam*, 268 F3d at 393.

[9] Defendant contends that the State Department's position deserves little weight because it only has taken that position for purposes of litigation. It appears, however, that the State Department's announced position has been consistent since at least 1970. *Emuegbunam*, 268 F3d at 392.

Defendant also contends that the State Department's nonlitigation position is quite different. In so arguing, defendant relies primarily on the fact that various internal State Department documents and publications refer to an arrested foreigner's "right" to consular access without delay. However, as we have noted above, 338 Or at 274-75, the mere use of the term "rights" does not necessarily convey acceptance of an individual right enforceable in judicial proceedings.

rights under Article 36 of the VCCR, was not well taken, and the trial court did not err in denying it.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.[10]

[10] Our legal conclusion in this case is consonant with every other state and federal case of which we are aware that has addressed the issue. *See, e.g., Emuegbunam*, 268 F3d at 390-94; *U.S. v. Jimenez-Nava*, 243 F3d 192, 192, 195-98 (5th Cir 2001), *cert den*, 533 US 962 (2001); *State v. Martinez-Rodriguez*, 131 NM 47, 54, 33 P3d 267, 271-74 (2001), *cert den*, 535 US 937 (2002); *Kasi v. Commonwealth*, 256 Va 407, 419, 508 SE2d 57, 63-64 (1998), *cert den*, 527 US 1038 (1999); *State v. Navarro*, 260 Wis 2d 861, 865-74, 659 NW2d 487, 489-94 (2003), *rev den*, 661 NW2d 101 (2003); *see also Li*, 206 F3d at 66-68 (Selya and Boudin, JJ., concurring). We also note that the Supreme Court of the United States on December 10, 2004, granted *certiorari* in *Medellin v. Dretke*, 371 F3d 270 (5th Cir 2004). That case, which is set for argument on March 28, 2005, involves certain of the issues that we decide today.

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on review, v. MOISES SANCHEZ-LLAMAS, Defendant-Appellant, Petitioner on Review.	))))))))))	Jackson County Circuit Court No. 996212FE SC S51289 CA A114418 ORDER GRANTING MOTION TO STAY ISSUANCE OF THE APPELLATE JUDGMENT

Petitioner on review's motion to stay the issuance of the appellate judgment is granted. The issuance of the appellate judgment is stayed. Upon receipt of notice from petitioner on review that no other thing has been filed requiring a judicial ruling, the appellate judgment will issue immediately. If the United States Supreme Court gives notice that a petition for writ of certiorari has been denied, the appellate judgment will issue forthwith.

Dated this 6th day of April 2005.

WALLACE P. CARSON, JR.
CHIEF JUSTICE

c: Mary Hazel Williams
Susan F. Drake

CONSULADO DE MEXICO

21 September 2001

The Honorable John Minnis and Max Williams
Joint Interim Judiciary Committee
900 Court Street, N.E.
Salem, OR 97301

RE: Vienna Convention on Consular Relations

Good afternoon Chairs Minnis and Williams, members of the committee.

I am Martha Ortiz de Rosas, Consul General of the Consulate of the United Mexican States in Portland, Oregon. The Mexican Consulate was established in 1996 and since then has been earnestly involved in protecting the rights and interests of Mexican nationals. Our efforts in protecting the rights and interests of Mexican nationals are guaranteed through international treaties and international judicial opinions interpreting those treaties, memoranda of understanding between Mexico and the United States, and United States constitutional provisions and federal legislation.

On behalf of the Mexican government I thank you for this opportunity to provide additional information to the people of the state of Oregon on the important issue of consular notification under the Vienna Convention on Consular Relations. We are most interested in assisting in whatever manner we are able to assist Oregon in effectively adhering to the mandatory requirement of advising detained foreign nationals of their right to consular notification and access.

I assure you that as we insist upon adherence to the requirements of the treaty, the United Mexican States also abides by those requirements. We have worked to preserve these rights through talks with the United States, resulting in a Memorandum of Understanding on Consular Protection of United States and Mexican Nationals, dated May 7, 1996. We have also joined others in seeking additional guidance and clarification in the form of a request for an advisory opinion from the Inter-American Human Rights Court, dated June 12, and 13, 1998. Our government has continued its efforts in effecting the rights established under the treaty through the Mexican Federal Court Penal Procedures, chapter II, special rules for the practices of diligences article 128-IV, when the foreigner detained does not

speak or does not sufficiently understands English, a translator will be designated to let them know their rights. The detention will be notified **without delay** to the diplomatic or consular representation that corresponds. In addition, in the enactment of Agreement A/008/2000 of the Attorney General of Mexico City on June 12, 2000, setting out in detail the requirements of the treaty and the procedure to be followed in recognizing those rights, the United Mexican States is committed to timely affording United States citizens detained in Mexico their rights under the treaty.

I trust that the tragic case of Jose Santos Victor Mejia Poot, earlier this year in Portland, is already known to members of this committee. That case, which resulted in Mr. Mejia-Poot's death, demonstrates the need for effective and uniform implementation of Article 36 of the Vienna Convention on Consular Relations. The Consulate was not notified of Mr. Mejia-Poot's detention until after his death. We know of many other cases in which Mexican nationals were not advised of their right to have the Consulate notified of their detention, including cases in which the ultimate and irreversible penalty of death applies. Some of those cases are currently pending in the Oregon courts and we continue to be notified of violations with some frequency.

I assume that this committee has already been provided with copies of the relevant provisions of the Vienna Convention. The relevant portion, for purposes of our discussion today, is Article 36 of that convention. There are several points that I would make concerning the text and meaning of Article 36:

1. Section (b) of Article 36 affords the foreign national individual rights in additional to the national rights afforded the sending nation. This was conclusively determined by the International Court of Justice in *Germany v. United States* on June 26, 2001. This means that both the detained individual as well as the sending nation may seek to enforce the provisions of the treaty and may seek sanctions or remedies for violations of the treaty. We submit this point is important for this committee's consideration as all of the state and federal court decisions of which we are aware had erroneously been based upon an assumption that the treaty's provisions did not establish individual rights.

2. The requirement that law enforcement officials notify a detained foreign national of the right to have their consulate notified is absolute. The treaty's language is not discretionary in this regard – authorities in this state **shall inform** the detained person of his rights to consular notification. With respect to my government, the government of the United Mexican States, the decision as to whether consulate is then notified is left up to the detained individual.

3. Notification of rights is to be done **without delay** when the foreign detainee is in the most vulnerable state leading to involuntary confessions. In fact, the Inter American Court of Human Rights in 1999 interpreted the phrase "without delay",

contained in article 36, as requiring notification no later that the time that the detainee gives his first statement. This is to preserve the detainee rights and allow the intervention of Consular officials.

4. The notification of rights must be made to any foreign national who is detained in any manner. We have observed much discussion concerning the point in time at which notification must be made. Many persons suggest notification be made at the point of arrest or booking into a correctional facility. However, the plain language of the treaty extends beyond arrest or booking -- it speaks explicitly of a foreign national **detained in any other manner**. The case of Mr. Mejia-Poot, who was detained civilly but not arrested, shows us the need for implementation of Article 36 even in cases where there has been no arrest. I note, also, for the committee, that Article 36 is not limited to certain types of detentions. Thus, a foreign national detained civilly as was Mr. Mejia-Poot is entitled to the notification, just as is a foreign national detained in a suspected case of a misdemeanor violation, just as is a foreign national detained in a suspected case of a felony violation. Additionally, I would like to note, for the committee that the rights and protections under article 36 extend not only to the beginning of the detention process, but all the way though that process. That means that consular intervention is ongoing through the detention process.

5. Sections (a) and (c) of Article 36, dealing with consular rights of access and communication with foreign nationals, are intertwined with those rights under section (b), dealing with the notification of rights and consular notification. On June 26, 2001, in *Germany v. United States*, the International Court of Justice explicitly found Article 36 to be an interrelated regime designed to facilitate the implementation of the system of consular protection. We believe the intervention of the Consulate at the time of Mr. Mejia-Poot's detention would have made a difference and would have averted that tragedy.

Our suggestion to this committee is legislation setting out the requirements of Article 36. We suggest a legislative solution due to our experiences with continuing failures of law enforcement to abide by the requirements of Article 36.

Although this committee is much better equipped to evaluate how best to implement the requirements of the treaty within the context of Oregon law, we suggest a detained foreign national be advised of their right to consular notification no later than at the point where Miranda would otherwise required, or, if Miranda is not applicable in a given case, at arrest or civil detention. Implementation at this point, through use of already established points of reference, would seem to more easily and effectively accomplish the implementation of the treaty's rights. We understand Miranda to be a point of reference which brings with it a component of detention, exactly what is described in the treaty. We also understand

Oregon law enforcement officers to already be educated and instructed to recognize this point of reference, thus hopefully making implementation of the treaty's rights smoother.

I understand that, perhaps, this committee may question the advisability of a legislative solution due to questions of liability. I note for the committee, however, that the requirements of the Vienna Convention on Consular Relations are obligatory on Oregon. The question is, I would submit, how Oregon is best to implement those obligatory requirements.

I also understand that, perhaps, this committee may have concerns about the potential collateral consequences to a foreign national upon their admission of their foreign status. I submit that this potential problem is one which can be addressed through careful drafting of the notification to be made to the foreign national. The Consulate has drafted a working proposal of the notification which I would be happy to share with the committee.

I would also like to provide information to this committee on the Consulate's internal protocol upon notification of the detention of a Mexican national. I provide this information so that this committee may better understand how consular notification translates into the protection of foreign nationals' rights. Consular staff speak the language of the detainee, they understand the legal system and they explain the rights to the detainee in a manner that is understandable to the detainee, due to an understanding of the language and culture. These special qualifications are unique to consular staff and cannot be substituted by similar intervention by defense attorneys, social workers, district attorneys or the courts. Failure to notify the detainee of his rights under article 36 can result in the violation of basic rights, such as the right to a fair trail.

Upon notification of the detention of a Mexican national the Consulate will contact the detainee and advise him in his native language of the following:

1. Not to make any statements, whether oral or written, regarding his or her case to anyone and in any setting without having his lawyer or a representative of the Mexican Consulate present;

2. Not to sign any document without having his lawyer or a representative of the Mexican Consulate present, especially if written in English and a Spanish translation is not available;

3. The right to obtain the services of a defense attorney regardless of the detainee's financial situation;

4. If necessary, the Consulate will aid the detained national in finding a competent lawyer;

5. That our Consular office will provide assistance to the indicated defense lawyer in his investigation when collecting information about the detainee's case, family, history in Mexico, witnesses, and other helpful information;

6. That the Mexican Consulate will follow up on the developments of the national's case; and

7. That the detained national has the right to be in continuous communication with the Consulate, including telephonic, written and personal contact.

Immediately following notification of the detention of a Mexican national, by phone or by fax, personnel from the department of Protection will contact the detainee to advise him of his rights as I have described, making effort to ensure that those rights are understood by the detainee. Again, immediate contact with detained Mexican nationals is our highest priority as we seek to effect the preservation and implementation of those citizens' rights as established in this country as well as under international law.

Thank you for the opportunity to appear before this committee and share information as we, together, work in harmony to protect and promote the rights of Mexican nationals and Oregonians alike. I look forward to my tenure here in Oregon and look forward to working with you.

Respectfully yours,

Martha Ortiz de Rosas
Consul General

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No. 04-10566

IN THE SUPREME COURT OF THE UNITED STATES

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

Petition for Writ of Certiorari to the
Oregon Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where petitioner has failed to make any showing that he was prejudiced as a result of the State's violation of the Vienna Convention, should this Court grant his petition for writ of certiorari to consider whether the Vienna Convention conveys individual rights of consular notification and access to a foreign detainee enforceable in the courts of the United States and whether suppression of petitioner's post-arrest statements to the police is an appropriate remedy for violation of those rights?

2. Petitioner contends that the police violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution when they obtained custodial statements from him following repeated Miranda warnings provided in both English and Spanish. This issue involves the routine application of settled law to the particular facts of this case and the Oregon Supreme Court declined to address it. Although petitioner attempts to incorporate the State's violation of the Vienna Convention into the mix of factors to be considered as relevant to the voluntariness question, petitioner's efforts are too late. Petitioner did not argue in the trial court or the Oregon Court of Appeals that the violation of the Vienna Convention played any role in petitioner's waiver of his Miranda rights and, although he made that argument in the Oregon Supreme Court, that court did not consider the unpreserved claim. Should this Court grant review to consider petitioner's claim?

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No. 04-10566

IN THE SUPREME COURT OF THE UNITED STATES

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

Petition for Writ of Certiorari to the
Oregon Supreme Court

OPINIONS BELOW

The Oregon Court of Appeals affirmed petitioner's conviction and sentence without issuing a written opinion. *State v. Sanchez-Llamas*, 191 Or. App. 399, 84 P.3d 1133 (2004), Pet. App. 12. The Oregon Supreme Court affirmed petitioner's conviction and sentence in a written opinion. *State v. Sanchez-Llamas*, 338 Or. 267, 108 P.3d 573 (2005), Pet. App. 14-23.

JURISDICTION

The Oregon Supreme Court issued its decision on March 10, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. Petitioner is a Mexican national, who was arrested in December 1999 after he shot at police, wounding one officer. *Sanchez-Llamas*, 338 Or. at 269, Pet.

App. 15. After his arrest, the police read petitioner *Miranda* warnings in both English and Spanish, but did not inform him that he could communicate with the Mexican consulate and did not inform the consulate of his arrest. *Id.* During interrogation, petitioner made a number of incriminating statements. *Id.*, 338 Or. at 270, Pet. App. 16. He moved pre-trial to suppress the post-arrest statements on the ground that the police failed to comply with the requirements of Article 36 of the Vienna Convention. *Id.* The trial court denied the motion and ruled that "any violation of the Vienna Convention that may have occurred * * * [did] not require suppression of [petitioner's] statements." *Id.* (quoting trial court ruling). After a jury trial, petitioner was convicted of 11 felony counts, including attempted murder and attempted aggravated murder, and sentenced to 246 months in prison. *Id.*

2. In his direct appeal to the Oregon Court of Appeals, petitioner raised the two issues he pursues here: (1) that his post-arrest statements should have been suppressed based on the State's violation of the Vienna Convention and (2) that his statements should have been suppressed because the circumstances surrounding his arrest and detention show that the statements and waiver of his *Miranda* rights were not voluntary. The Oregon Court of Appeals affirmed without issuing a written opinion. *State v. Sanchez-Llamas*, 191 Or. App. 399, 84 P.3d 1133 (2004).[1]

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[1] The Oregon Court of Appeals addressed the Vienna Convention issue in *State v. Chavez*, 172 Or. App. 326, 19 P.3d 923 (2001), and concluded that suppression of evidence is not the appropriate remedy for a violation of the Vienna Convention. The Oregon Supreme Court allowed review, but did not reach the merits because the court determined that Chavez had failed to preserve the argument that

Footnote continued

3. The Oregon Supreme Court granted review and affirmed. The court addressed only the first issue—whether the State's violation of the Vienna Convention required suppression of petitioner's post-arrest statements—and concluded that the Vienna Convention "does not create rights that individual foreign nationals may assert in a criminal proceeding." *Sanchez-Llamas*, 338 Or. at 269, Pet. App. 15. The court began by noting "the general rule, widely recognized in the federal courts, [] that rights created by international treaties belong to the signatory state and are *not* enforceable in American courts by private individuals." *Id.* at 272, Pet. App. 18 (emphasis in original). The court acknowledged that the presumption against the creation of individual, judicially enforceable rights may be overcome "by explicit wording and even by provisions that necessarily imply a private right of judicial enforcement." *Id.* at 274, Pet. App. 20. Nevertheless, the court found nothing in Article 36 of the Vienna Convention to suggest that the treaty refers to a detainee's "rights" as anything other than a convenient way of describing the obligation of the signatory state. *Id.* at 275, Pet. App. 21. Instead, the wording and purposes of the treaty "suggest that the treaty and Article 36 are concerned with relationships and obligations among *nations*, not with individual rights." *Id.* (emphasis in original; footnote omitted).

(...continued)
suppression is required for violations of the Convention. *State v. Chavez*, 335 Or. 44, 56 P.3d 923 (2002). In this case, petitioner acknowledged in the Court of Appeals that that court's prior holding in *Chavez* controlled.

Finally, the court considered the State Department's interpretation of the Vienna Convention as consistent with the court's reasoning, *Id.* at 276, Pet. App. 22, and noted the unequivocal agreement of the state and federal courts that have addressed the issue. *Id.* at 277 n. 10, Pet. App. 23. The court concluded "that Article 36 of the [Vienna Convention] does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding" and affirmed petitioner's conviction and sentence. *Id.* at 276-277, Pet. App. 22-23.

ARGUMENT

1. Petitioner asks this Court to consider whether he is entitled, in a state criminal proceeding, to suppression of otherwise-lawfully obtained statements because of the State's failure to comply with Article 36 of the Vienna Convention on Consular Relations. April 24, 1963, [1970] 21 U.S.T. 77, 100-01. The absence of any evidence establishing that petitioner was prejudiced by the State's failure to comply with the Vienna Convention makes this case unsuitable for the Court to address the questions petitioner presents—whether a criminal defendant has an individually enforceable right under the Vienna Convention and whether suppression of evidence is the appropriate remedy for violation of that right.

Petitioner also asks this Court to consider whether the State violated his rights under the Fifth and Fourteenth Amendments when it obtained custodial statements. The law in this area is well established and this case presents nothing new for this Court's consideration. Although petitioner may be correct that the State's violation of the Vienna Convention would be a new factor for the Court to consider in determining

whether his statements were voluntarily made, that claim is not properly before this Court. Petitioner failed to preserve that claim in the state trial court and the Oregon Court of Appeals and, although he presented the claim to the Oregon Supreme Court, that court refused to address it. Therefore, it is not properly before this Court. *See Cutter v. Wilkinson*, 544 U.S. ___, 161 L. Ed. 2d 1020, 1032 n. 7, 125 S. Ct. 2113, 2120 n. 7 (2005) ("Because these defensive pleas were not addressed by the [lower court], and mindful that we are a court of review, not of first view, we do not consider them here.").

2.a. Petitioner contends that the trial court erred in refusing to suppress post-arrest statements petitioner made to the police. Petitioner sought suppression because the police failed to inform him that he could contact the Mexican consulate and failed to contact the consulate and notify them of petitioner's arrest. Pet. 12-22. In order to prevail on a claim that statements should be suppressed whenever the State fails to fully follow the requirements of the Vienna Convention, a criminal defendant must prevail on three questions: (1) Does the Vienna Convention, a treaty among nations, confer individually enforceable rights? (2) If it does, is suppression of statements in a criminal case in state court an appropriate remedy for the violation of those rights? and (3) If suppression is a remedy, has the defendant made the showing of prejudice necessary to have the statements suppressed in his or her particular case? If the court answers "no" to any of these questions, the defendant loses and the statements should not be suppressed on the basis of a violation of the Vienna Convention.

This case does not warrant granting review because petitioner asks this Court to consider only the first two of those three questions, presumably because petitioner has never made a showing that things would have turned out differently had the State fully complied with the Vienna Convention. His failure to address the third question makes this case an inappropriate vehicle for this Court to review the first two questions, so the State begins there.

Petitioner made no attempt in the trial court or the state appellate courts to establish that he suffered prejudice as a result of the State's failure to comply with the Vienna Convention notification requirements. Petitioner did not establish in the state trial court—and therefore could not establish in the state appellate courts—that he would have done anything differently in his interactions with the police had they informed him of his "right" to consular notification. Nor did petitioner establish how the Mexican consul would have responded to notification had the police informed the consul of petitioner's arrest. The closest petitioner comes is to attach a letter from the Consul General of the Consulate of the United Mexican States in Portland, Oregon, to state legislative leaders in 2001, explaining efforts of the Mexican government under the Vienna Convention and encouraging the passage of state legislation that would promote compliance with the Vienna Convention. Pet. App. 25-29. That letter was not made part of the record before the trial court and, even had it been, is insufficient to establish petitioner was prejudiced as a result of the State's failure to comply with the Vienna Convention because it says nothing about how petitioner would have responded to actions usually taken by the Mexican consul in response to notification.

In *Breard v. Greene*, 523 U.S. 371 (1998), this Court expressed considerable skepticism that *any* remedy could be granted under the Vienna Convention without a showing of prejudice. The Court concluded that, even if a foreign national has individually enforceable rights under the Vienna Convention, the individual must comply with procedural rules in order to bring a claim. *Id.* at 376-77. Because "Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in the state courts[,]" *Id.* at 375, the Court denied his petition for an original writ of habeas corpus and petition for certiorari. *Id.* at 378.

The Court noted that Breard's failure to raise his claim under the Vienna Convention in state court prevented Breard from obtaining an evidentiary hearing that would be necessary to establish his claim. "Without a hearing, Breard cannot establish how the Consul would have advised him, how the advice of his attorneys differed from the advice the Consul could have provided, and what factors he considered in electing to reject the plea bargain that the State offered him." *Id.* at 376. "Even were Breard's Vienna Convention claim properly raised and proved, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." *Id.* at 377.

The same problem exists in this case. Petitioner cannot now establish how compliance with the Vienna Convention would have had an effect on his trial and conviction. Nor does petitioner offer any reason why this Court should disregard his

failure to establish prejudice. On this limited record, this Court need not reach the issues petitioner presents.

b. State and federal courts that have considered this issue have reached a similar conclusion that a defendant must establish prejudice in order to prevail in a claim under the Vienna Convention. In *United States v. Tapia-Mendoza*, 41 F.Supp.2d 1250, 1254 (D. Utah 1999), the court set out a specific test of prejudice. To establish prejudice for a Vienna Convention violation, the court held, the defendant must produce evidence that: (1) he did not know of his right to consult the consulate; (2) he would have availed himself of the right, had he known of it; and (3) there was a likelihood that contact with the consulate would have resulted in assistance to him. *See United States v. Rodrigues*, 68 F.Supp.2d 178, 183 (E.D.N.Y. 1999) (holding that "courts have unanimously held that in order for a foreign national to win relief for a Convention violation, he or she must show that the lack of consular notification prejudiced his or her case," and that, in any event, suppression is not a remedy); *United States v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000) ("Even presuming the Vienna Convention creates individually enforceable rights, Mr. Chanthadara has not demonstrated that denial of such rights caused him prejudice"), *cert. den.* ___ U.S. ___ [122 S. Ct. 457] (2001); *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir.), *cert. den.* 521 U.S. 1144 (1997) ("Murphy has also failed to establish prejudice from the alleged violation of the Vienna Convention because he is unable to explain how contacting the Mexican consulate would have changed either his guilty plea or his sentence"). Moreover, "[p]rejudice has never been—nor could

reasonably be—found in a case where a foreign national was given, understood, and waived his or her *Miranda* rights." *Rodrigues*, 68 F.Supp.2d at 184.[2]

c. On the two questions petitioner did preserve and litigate—whether the Vienna Convention creates individually enforceable rights and whether suppression of evidence in a criminal trial is an appropriate remedy for violation of the Vienna Convention—petitioner has not demonstrated that this case warrants this Court's review. Petitioner does not—and cannot—argue that there is a split among the lower courts on these issues. To the contrary, the lower courts have been remarkably consistent in rejecting the arguments petitioner makes.

In addition to the Oregon Supreme Court, every other court in this country that has addressed the first question has concluded that the Vienna Convention does not establish a right that is individually enforceable in a criminal proceeding. *See United States v. De La Pava*, 268 F.3d 157, 164-65 (2nd Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d 192, 195-98 (5th Cir.), *cert. den.* 533 U.S. 962 (2001); *United States v. Emuegbunam*, 268 F.3d 377, 392, 394 (6th Cir. 2001), *cert. den.* 535 U.S. 977 (2002); *State v. Vasquez*, 2001 Del. Super. LEXIS 209 (Del. Super. Ct. 2001); *Villegas v. State*, 273 Ga. 824, 546 S.E.2d 504 (2001); *Kansas v. Rosas*, 28 Kan. App. 2d 382, 17 P.3d 379 (2000); *Commonwealth v. Diemer*, 57 Mass. App. Ct. 677, 785 N.E.2d 1237

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[2] As the *Rodrigues* court explained, "Courts have uniformly found that no prejudice can exist in that situation, because the advice a consular official would give would simply augment the content of *Miranda*, which the foreign national has already waived." 68 F.Supp.2d at 184.

(2003); *New Jersey v. Homdziuk*, 369 N.J. Super. 279, 848 A.2d 853 (2004); *State v. Martinez-Rodriguez*, 131 N.M. 47, 54, 33 P.3d 267 (New Mexico 2001), *cert. den.* 535 U.S. 937, 152 L. Ed. 2d 225, 122 S. Ct. 1317 (2002); *Kasi v. Commonwealth*, 256 Va. 407, 508 S.E.2d 57 (Virginia 1998), *cert. den.* 527 U.S. 1038 (1999); *Wisconsin v. Navarro*, 659 N.W.2d 487 (2003); *see also United States v. Li*, 206 F.3d 56, 61 (1st Cir. 2000) (*en banc*), *cert. den. sub nom Mu v. United States*, 531 U.S. 956 (2000) (Selya and Boudin, JJ, concurring, concluded that no individual right is created by the Vienna Convention).[3]

d. Similarly, every appellate court that has addressed the second question has concluded that suppression of otherwise legally obtained evidence is not an appropriate remedy for violations of Article 36 of the Vienna Convention. One of the more-thoroughly analyzed opinions, relied on by many other courts, is the Ninth Circuit's *en banc* discussion of the issue in *Lombera-Camorlinga*. Because of the persuasiveness of the court's analysis, the State summarizes it briefly for this Court. Like petitioner in this case, Lombera-Camorlinga argued that the Vienna Convention was intended to serve the same purposes as the warnings required by *Miranda*, and

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[3] One court has recognized foreign nationals' standing to bring actions for damages for violations of the Vienna Convention. *Standt v. City of New York*, 153 F. Supp. 2d 417 (S.D.N.Y. 2001) (violation of Article 36 supports action under 42 USC § 1983). In addition, the International Court of Justice reads Article 36 to provide rights to individuals, however the decisions of that court are not binding on courts in this country. *See LaGrande* case (*Germany v. United States of America*), 2001 I.C.J. 466 (Judgment of June 27) and *Case Concerning Avena and other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. No. 128 (Judgment of Mar. 31).

that, like a violation of *Miranda*, failure to comply with the Convention notice requirements demands suppression. A panel of the Ninth Circuit agreed with the defendant. *United States v. Lombera-Camorlinga*, 170 F.3d 1241 (9th Cir. 1999). The full court withdrew the panel opinion and, in its *en banc* decision, rejected the defendant's argument, relying on the following points:

* Unlike *Miranda*, the advice of rights required by Article 36 is not tied to interrogation.

* The Vienna Convention does not require interrogation to cease once the suspect invokes the right to have the consulate notified.

* The rights to counsel and against self-incrimination are not "universally recognized or enforced" internationally.

* Because the Vienna Convention was drafted before the United States Supreme Court decided *Miranda*, there is "no reason to think the drafters of the Vienna Convention had these uniquely American rights [*i.e.*, suppression of evidence for a violation] in mind[.]"

* "[A]n exclusionary rule is typically available only for constitutional violations, not for statutory or treaty violations."

* Although entitled to only "some deference," the United States Department of State "has expressed its opinion that suppression is an inappropriate remedy."[4]

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[4] The court noted:

> The State Department indicates that it has historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law enforcement to prevent future violations when necessary. The addition of a judicial enforcement mechanism contains the possibility for conflict between the respective powers of the executive and judicial branches.

206 F.3d at 887.

> * "[N]o other signatories to the [Vienna Convention] have permitted suppression under similar circumstances, and * * * two (Italy and Australia) have specifically rejected it."

206 F.3d at 886-88.

As noted, no appellate court has reached a result that is contrary to the analysis set out in *Lombera-Camorlinga* and many courts have reached the same conclusions as the Ninth Circuit, often relying on the Ninth Circuit's reasoning. For examples of state courts holding that suppression is not a remedy in a criminal proceeding when law enforcement officers do not comply with Article 36 of the Vienna Convention, *see Arizona v. Prasertphong*, 75 P.3d 675, 407 Ariz. Adv. Rep. 31 (2003); *People v. Corona*, 89 Cal. App. 4th 1426, 1429, 108 Cal. Rptr. 2d 210 (2001); *People v. Preciado-Flores*, 66 P.3d 155 (Colorado 2002); *People v. Hernandez*, 745 N.E. 2d 673, 683 (Ill. App. 2001); *Zavala v. Indiana*, 739 N.E.2d 135 (Ind. 2000); *State v. Buenaventura*, 660 N.W.2d 38, 46 (Iowa 2003); *State v. Rosas*, 17 P.3d 379, 386 (Kan. App. 2000); *Commonwealth v. Diemer*, 57 Mass. App. Ct. 677, 785 N.E.2d 1237 (2003), *review denied* 439 Mass. 1106, 790 N.E.2d 1089 (2003); *Cardona-Rivera v. State*, 33 S.W.3d 625, 627 (Mo. App. 2000); *New Jersey v. Homdziuk*, 369 N.J. Super. 279, 848 A.2d 853 (2004); *State v. Martinez-Rodriguez*, 33 P 3d 267 (N.M. 2001); *Garcia v. State*, 17 P.3d 994, 117 Nev. Adv. Rep. 13 (2001); *State v. Tuck*, 2001 Ohio 7017, 146 Ohio App. 3d 505, 766 N.E.2d 1065 (2001); *Rocha v.*

State, 16 S.W. 3d 1 (Tex. Ct. Crim. App. 2000);[5] *State v. Jamison*, 20 P.3d 1010, 1016 (Wash. App. 2001) (following *Lombera-Camorlinga*); *State v. Martinez-Lazo*, 999 P.2d 1275 (Wash. App. 2000) (same).[6]

In addition to the Ninth Circuit in *Lombera-Camorlinga*, other federal courts have concluded that suppression is not a remedy for violation of the Vienna Convention. *See, e.g., United States v. Li*, 206 F.3d at 60; *United States v. Jimenez-Nava*, 243 F.3d at 198;[7] *United States v. Page*, 232 F.3d 536, 540 (6th Cir. 2000), *cert.*

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[5] After pointing out that no other signatories to the Vienna Convention have permitted suppression in similar circumstances, the court observed:

> If we find now that the Vienna Convention treaty must be enforced through the exclusionary rule provided by [the state statute], Texas may soon find itself to be the *only* jurisdiction in the entire world that enforces the treaty through the use of an exclusionary rule sanction.

16 S.W. 3d at 17 (emphasis in original; footnote omitted).

[6] The State is aware of only one decision by any state or federal court in the nation holding that suppression is an appropriate remedy in such circumstances. In *State v. Reyes*, 740 A.2d 7 (Del. Super. 1999), the intermediate appellate court—applying federal law—concluded that suppression is appropriate for a Vienna Convention violation. It should be noted, however, that the *Reyes* court relied heavily on the analysis in the panel opinion in *United States v. Lombera-Camorlinga*, 179 F.3d 1241 (9th Cir. 1999). But, as noted above, that decision was withdrawn by the *en banc* Ninth Circuit, which concluded that suppression is not a remedy. Moreover, the *Reyes* decision has been called into question by a subsequent case. In *State v. Vasquez*, 2001 Del. Super. LEXIS 209 (Del. Super. Ct. May 23, 2001), the court noted that *Reyes* was based on a decision that had since been overruled and commented that "[i]t is very likely that this Court would decide the matter differently now based on the current state of the law regarding consular notification."

The Fifth Circuit also cited Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELEY J. INT'L L. 147, 179 (1999) ("It would take an enormous leap in logic, therefore, to argue that the signatories to the Vienna

Footnote continued...

den. 532 U.S. 1056 (2001); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 622 (7th Cir.), *cert. den.* 531 U.S. 1026 (2000)[8]; *United States v. Minjares-Alvarez*, 264 F.3d 980, 986 (10th Cir. 2001); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000), *cert. den. sub nom Zuniga v. United States*, 531 U.S. 1131 (2001).

e. The rulings of these appellate courts are consistent with the position taken by the State Department on these issues. The State Department is responsible for the negotiation and administration of treaties and its interpretation of treaties is entitled to considerable weight, although not binding on reviewing courts. *Kolovrat v. Oregon*, 366 U.S. 187, 194, 6 L. Ed. 2d 218, 81 S. Ct. 922 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great

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(...continued)
Convention intended for violations to be cured by the exclusion of evidence or the dismissal of charges.").

[8] The Seventh Circuit noted:

> We also note that to impose judicially such a drastic remedy, not imposed by any other signatory to this convention, would promote disharmony in the interpretation of an international agreement. *See* Restatement of Foreign Relations Law § 325 cmt. d (1987) ("Treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between international legal systems.").

226 F.3d at 622.

weight."). The State Department consistently has taken the position that the Vienna Convention may benefit foreign nationals, but it does not create judicially enforceable individual rights that can be remedied in the criminal justice systems of the signatory countries. *See Li*, 206 F.3d at 63-64; *see generally* Brief for the United States as Amicus Curiae Supporting Respondent filed in *Medellin v. Dretke*, No. 04-5928, at 18-31.

According to the State Department, "the [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Li*, 206 F.3d at 63 (quoted authority and quotation marks omitted). In *Li*, the First Circuit Court of Appeals specifically asked the State Department its views on whether the Vienna Convention creates individual rights at all. *Id.* The State Department concluded that the Vienna Convention is a treaty that establishes rights between the signatory countries, not rights of individuals. "The right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals when consular relations exist between the states concerned." *Id.*, quoting the Department of State Answers to the Questions Posed by the First Circuit. The State Department asserted this same position in two international tribunals, including the International Court of Justice, and in an advisory letter to state governors in 1970 and another advisory letter issued in 1989. *Id.*, at 64.

The Executive Branch continues to take the position that the Vienna Convention does not confer individually enforceable rights, including before this

Court last term. The United States appeared as amicus curiae in *Medellin v. Dretke*, 544 U.S. ___, 125 S. Ct. 2088, 161 L. Ed. 2d 982 (2005), and argued that Article 36 of the Vienna Convention "does not give a foreign national a judicially enforceable right to challenge his conviction or sentence." Brief of United States at 22-23. Although the President of the United States has determined that the International Court of Justice *Avena* decision should be enforced in state courts for the 51 involved individuals, that determination does not apply to petitioner's case or provide a basis for this Court's review of petitioner's claims.

f. Part of petitioner's argument deserves special comment. Petitioner argues that traditional remedies for violations of international treaties are insufficient for violations of Article 36 of the Vienna Convention and that he "is also entitled to suppression because of the egregious nature of the police misconduct." Pet. 21. Petitioner is wrong on both points. Interpretation, application, and enforcement of an international treaty is an area that traditionally has been an executive branch function. And there are good reasons for that. As a concurring opinion in the First Circuit's *en banc* decision in *Li* pointed out in the context of the Vienna Convention:

> There is an elaborate regime of practices and institutions by which the United States and other nations enforce commitments *inter sese* or decide that, in the national interest, promises given by or to another sovereign should not be enforced in a specific case. Sometimes this is done purely for reasons of prudence, sometimes for convenience, or sometimes to secure advantage in unrelated matters. Incalculable mischief can be wrought by gratuitously introducing into this often delicate process court enforcement at the instigation of private parties. We believe that such a course is to be avoided unless it can be said that private enforcement was clearly agreed to and envisioned by the

> contracting States in the treaties themselves. That is plainly not the case here.

Li, 206 F.3d at 68 (Selya and Boudin, JJ, concurring).[9] Contrary to petitioner's assertion that suppression is required "to secure law enforcement's compliance with the treaty's terms" (Pet. 21), use of a suppression remedy in state court in this context could have serious diplomatic and political consequences by interfering with the traditional remedies.

Moreover, no special remedy is needed "because of the egregious nature of the police misconduct." Pet. 21. Although it is true that there have been violations of the Vienna Convention in spite of the 35-plus years of its existence, it is not true that this Court must impose suppression as a remedy for violations of the Convention because "[t]he state's disregard for the treaty plainly illustrates why suppression is the most likely remedy to secure law enforcement's compliance with the treaty's terms" and that "[u]nless and until consular notification and access is enforced by means of suppression, violations will continue to occur on a regular basis." *Id.*

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[9] Similarly, the court in *Lombera-Camorlinga* explained:

> The State Department indicates that it has historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law enforcement to prevent future violations when necessary. The addition of a judicial enforcement mechanism contains the possibility for conflict between the respective powers of the executive and judicial branches.

206 F.3d at 887.

Contrary to petitioner's dire warnings that only this Court's ruling requiring suppression of evidence can improve compliance with the Vienna Convention, the State has taken significant steps on its own to ensure greater compliance. The State has worked with numerous interested parties to enhance awareness of the Vienna Convention requirements and simplify compliance. Oregon Attorney General Hardy Myers convened a group in September 2000 to explore ways in which Oregon law enforcement officials could more efficiently comply with Article 36 of the Vienna Convention. *See* Peter Shepherd, *The Vienna Convention on Consular Relations: An Oregon Law Enforcement Perspective*, 11 Willamette J. Int'l L. & Dispute Res. 53, 58 (2004). As a result, police recruits and newly hired law enforcement officers receive special instruction about the Vienna Convention and jail managers have agreed on a form of notification to be used in all state jails to notify aliens of the requirements of the Convention. *Id.* at 58-9.

In addition to these steps, the 2003 Oregon Legislative Assembly enacted two laws related to Article 36 of the Vienna Convention. One amended Or. Rev. Stat. §§ 181.642, 426.070, 426.228 and 426.234 to clarify the obligation of the Board on Public Safety Standards and Training to include training about the Vienna Convention requirements for all police officers and certified reserve officers, to direct a peace officer who takes a person into custody and suspects that the person is a foreign national to comply with the Convention notification requirements, and to direct judges and health professionals involved in mental commitment procedures to inform any allegedly mentally ill person who is suspected of being a foreign national of the

Vienna Convention provisions. Or. Laws 2003, ch. 109. The second piece of legislation amended Or. Rev. Stat. §§ 109.119, 125.060, 419A.255 and 419B.851 to require service of certain legal documents on the consulate where appropriate under the Vienna Convention. Or. Laws 2003, ch. 143. The changes in both of these enactments took effect on January 1, 2004.

These efforts demonstrate that the State has not deliberately disregarded or neglected its duties under the Vienna Convention. It is not necessary for this Court to impose the extreme remedy of suppression in order to prompt the State to do what it is required to do by law.

3. As a second issue, petitioner asks this Court to review whether his statements to the police should have been suppressed because they were not voluntary. The Oregon Supreme Court did not address this "alternate theory for suppression, *viz.*, that the circumstances surrounding his arrest and detention show that his post-arrest statements, including his purported waiver of his *Miranda* rights, were not made voluntarily." *Sanchez-Llamas*, 338 Or. at 269 n. 2, Pet. App. 15.

Petitioner acknowledges that "this [C]ourt has examined the voluntariness of *Miranda* waivers under coercive circumstances in the past." Pet. 22. Nevertheless, petitioner asserts that "this case presents that question in the unique light of the police failure to inform petitioner of his Vienna Convention rights to consular notification and access." *Id.* Contrary to petitioner's assertion that this "presents a question of first impression," *id.*, the claim involves the application of settled law to the specific

facts in this case and presents nothing new for this Court's review.[10] Although petitioner challenged the voluntariness of his statements on several grounds in the state trial court and Court of Appeals, violation of the Vienna Convention never was one of those grounds. The first time he raised that particular issue was before the Oregon Supreme Court. However, his failure to present it before then meant that it was not properly before the state supreme court on review. Or. Rules App. Proc. § 9.20(2), App 1. And his failure to properly present it in the state courts means it is not properly before this Court on review. *United States v. Williams*, 504 U.S. 36, 41-42 (1992).

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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August 15, 2005

MHW:mlk:APP82973

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[10] This Court "rarely" grants a petition for certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10.

APPENDIX

Or. Rules App. Proc. § 9.20(2)

If the Supreme Court allows a petition for review, the court may limit the questions on review. If review is not so limited, the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court. The Supreme Court's opinion need not address each such question. The court may consider other issues that were before the Court of Appeals.

No. 04-10566

IN THE

SUPREME COURT OF THE UNITED STATES

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

PROOF OF MAILING: RESPONDENT'S BRIEF IN OPPOSITION

I, Erika L. Hadlock, a member of the Bar of the Court, hereby certify that on August 15, 2005, in compliance with Rule 29, I mailed the Respondent's Brief in Opposition of the State of Oregon in the above-entitled case, by depositing 10 copies in the United States mailbox, express mail, postage prepaid, addressed to the Office of the Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543.

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v.

STATE OF OREGON,

Respondent.

PROOF OF SERVICE: RESPONDENT'S BRIEF IN OPPOSITION

I, Erika L. Hadlock, a member of the Bar of the Court, hereby certify that on August 15, 2005, three copies of the Respondent's Brief in Opposition of the State of Oregon in the above-entitled case were mailed, first class postage prepaid, to Peter A. Ozanne and Susan F. Drake, Office of Public Defense Services, 1320 Capitol Street NE, Suite 200, Salem, Oregon 97303-6469, attorneys for petitioner. I further certify that all parties required to be served have been served.

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SUPREME COURT, U.S.
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OFFICE OF THE CLERK

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Respondent.

ON WRIT OF CERTIORARI TO
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QUESTIONS PRESENTED

1. Does Article 36 of the Vienna Convention on Consular Relations confer on a foreign national detained in the United States individual rights of consular notification and access enforceable in the courts of the United States by that national?
2. Does the failure to advise a foreign national detained in the United States of his rights under the Vienna Convention result in the suppression of his statements to police?

PARTIES

All parties to the case in the Oregon Supreme Court are named in the caption.

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OPINIONS BELOW

The Jackson County Circuit Court entered an unpublished criminal judgment against petitioner. The Court of Appeals of Oregon affirmed petitioner's conviction without opinion, and the result is reported in tabular form at 191 Or. App. 399, 84 P.3d 1133. The order of the Supreme Court of Oregon allowing review is reported in tabular form at 337 Or. 34, 93 P.3d 71. The Oregon Supreme Court opinion affirming petitioner's conviction is reported at 338 Or. 267, 108 P.3d 573.

JURISDICTION

The Supreme Court of Oregon issued its final judgment on March 10, 2005. Petitioner filed a timely petition for certiorari on June 7, 2005. This Court granted certiorari on November 7, 2005. This Court has jurisdiction pursuant to Article III, § 2, of the United States Constitution, and 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

Article VI of the United States Constitution is quoted in pertinent part at page 1 of the Petition. Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 100-101, T.I.A.S. No. 6820 [hereinafter "Vienna Convention"], is quoted in full at page 2 of the Petition.

STATEMENT OF THE CASE

In this case, Petitioner Moises Sanchez-Llamas, a national of Mexico, seeks judicial enforcement of his rights to consular notification and assistance under Article 36 of the Vienna Convention on Consular Relations. It is undisputed that authorities of the State of Oregon violated the Vienna Convention by failing to advise Mr. Sanchez-Llamas of his Article 36 rights in his criminal case.

A. The Vienna Convention on Consular Relations

The Vienna Convention, to which the United States is a party, "is widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention." U.S. Dep't of State, Telegram 40298 to the U.S. Embassy in Damascus (Feb. 21, 1975), *reprinted in* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991). The

United States played a leading role at the 1963 diplomatic conference that produced the Vienna Convention. *Report of the United States Delegation to the United Nations Conference on Consular Relations, reprinted in* VIENNA CONVENTION ON CONSULAR RELATIONS AND OPTIONAL PROTOCOL, S. EXEC. DOC. E, 91-9, at 59-61 (1969) [hereinafter "*Report of the United States Delegation*"]. The United States signed the Vienna Convention on April 24, 1963, and with the unanimous advice and consent of the Senate, *see* 115 CONG. REC. 30,997 (Oct. 22, 1969), President Nixon ratified it on December 24, 1969. *See* 21 U.S.T. 77, 185.

Article 36 of the Vienna Convention establishes an interrelated regime of rights that enables consular officers to protect nationals who are detained in foreign countries. Article 36(1)(b) requires the authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of the arrest or detention, also "without delay." Article 36(1)(a) and (c) require the detaining country to permit the consular officers to render various forms of assistance. Finally, Article 36(2) requires that a country's "laws and regulations ... enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

To date, 168 nations have ratified the Vienna Convention, making it one of the most widely ratified multilateral treaties in force.[1] The United States has described the rights and obligations set forth in Article 36 as "of the highest order," in large part because of the reciprocal nature of these obligations and the importance of these rights to United States citizens abroad. ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, at 161 (1973).

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[1] *See* Multilateral Treaties Deposited with the Secretary-General: Vienna Convention on Consular Relations, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp (last accessed December 22, 2005).

B. Petitioner's Arrest and Interrogation

According to testimony at trial, at some time after 3:00 a.m. on December 18, 1999, two roommates of respondent's girlfriend called the police, reporting that respondent had threatened them with a gun. (Tr. 338-49, 355-59, 390-98, 366, 453-54, 497.) Petitioner had consumed a large amount of alcohol and was heavily intoxicated. (Tr. 381-84, 594, 614, 692-94.) Officers Michael Strouse and Scott Clauson, who were among the officers responding to the call, approached petitioner, who was crouched behind a duplex with his back to the officers. (Tr. 456-57, 477, 764, 767-68, 483.) According to the officers' testimony, Officer Clauson shined his flashlight on defendant, saw a gun in his hand, identified himself as a police officer, and said, "Drop the weapon." (Tr. 460, 769.) After an exchange of gunfire lasting no more than 10 seconds, Officer Clauson was wounded in the leg. (Tr. 459-63, 465, 484-86, 499, 534-35, 550, 563-64, 571-72, 723-27, 732, 735, 769-70, 775.)

Shortly thereafter, petitioner was arrested. At least 10 officers were present at the arrest. (Tr. 33.) The officers told petitioner to show his hands and come out from behind the building. (Tr. 27-28, 30, 46-47, 68, 88, 90, 94, 104-105.) According to the officers, petitioner came out with his hands up, stopped, and turned around, but he did not go down on his knees when so instructed. (Tr. 47, 69-71, 90, 111-13.) One officer tackled petitioner, knocking him face-down to the ground, and three other officers joined in to subdue and handcuff him. (Tr. 34, 48, 71, 96-96, 106-07.) The officers punched petitioner and administered "focus blows" with a flashlight to his face, back, and arms. (Tr. 49, 91, 106.)

At 3:48 a.m., a paramedic examined petitioner in the police station and asked in English if he was in pain, if he wanted to go to the hospital, and if he wanted treatment. (Tr. 76-77.) Petitioner shook his head and said, "No," and told her, "Bang, Bang," while miming being hit on the head and chest. (Tr. 77, 81-82.)

At 4:36 a.m., Detective William Ford began interrogating petitioner, with "Community Service Officer" Arturo Vega acting as interpreter, and they quickly established that petitioner was a Mexican national who spoke little English.

(Tr. 76, 108, 118, 123, 136, 175.) Petitioner appeared "heavily intoxicated," but also "coherent" and able to communicate "effectively." (Tr. 124-25, 176.)

Police advised petitioner of the *Miranda* rights in Spanish and English, and he indicated that he understood. (Tr. 122-23.) Petitioner said that he was walking to his brother's house when he saw the police across the street and then running behind the duplexes. (Tr. 147, 150.) As he was crossing the street, he heard shooting, but did not think the police were shooting at him. (Tr. 150.) He got scared and got rid of a black gun. (Tr. 125, 150, 205.) Petitioner denied firing the gun or possessing a second gun. (Tr. 126, 148-49, 151.)

Detective Barthel joined Detective Ford and Officer Vega, and the interrogation resumed at 6:05 a.m. (Tr. 126-27.) Petitioner began to complain of being dizzy and in pain, and he wanted to lie down on the floor. (Tr. 128-29.) At 7:00 a.m., they took him to the hospital. (Tr. 129.) Nurse Beatrice Martinez, who is fluent in Spanish, testified that petitioner was "slurry," lethargic, and not "fully alert." (Tr. 162-65.)

Detective Ford, Officer Vega, and Detective Barthel resumed the interrogation at 7:33 a.m., while petitioner was lying on a bed waiting to be x-rayed. (Tr. 129-30.) Petitioner was re-advised of his *Miranda* rights in Spanish and English. (Tr. 129-30.) The interrogation continued with a few short breaks for medical attention, and petitioner continued to deny shooting at police. (Tr. 130-34.) The police maintained a constant presence at his side.

At 9:45 a.m., after taking petitioner back to the police station, the police resumed the interrogation. (Tr. 120, 135.) The officers told petitioner that he must be honest with them "because you are not going to have many chances to tell us." (Tr. 135, 152; Ex. 1, at 1.) Officer Vega added that it "is going to go a lot further being honest with [the police] than lying to [the police]" and that the "police are going to find out anyway, so it's better that you talk now. Better than ... later, they go after you more, ok?" (Tr. 179-80; Ex. 1, at 6.)

Petitioner said that "they" shot at him first, that he was not doing anything, and that he did not know why they were shooting. (Ex. 1, at 2, 7, 8, 15.) When he shot, he was shooting up in the air. (*Id.* at 3.) After being told it did not matter how

many guns he had, he said that he had a second gun, but he also said that he did not pull out the second gun until he left it on the ground, and that he had only fired one gun. (*Id.* at 4-5, 7, 8, 12.)

When challenged as to how he could hit an officer if he were only firing into the air, petitioner demonstrated firing as he brought up the gun. (*Id.* at 16-17.) The officers suggested that petitioner pulled out the black gun as he was firing the chrome gun in the air, and petitioner agreed but denied firing the black gun. (*Id.* at 20-21.) Petitioner said he only fired three or maybe four bullets. (*Id.* at 21, 24, 50.) Asked if he fired shots from the black gun straight ahead, petitioner first said yes, and then denied it. (*Id.* at 21-24.) At one point, he admitted firing both guns in his possession, but the evidence at trial established that only one of the two guns was fired. (Ex. 1, at 24, 50; Tr. 485, 584-85, 719-20, 730, 771.)

Near the end of this phase of the interrogation, the officers asked petitioner to describe his *Miranda* rights, and petitioner said, "that it would be better if I told the truth and everything." (Ex. 1, at 64.) When asked in the interrogation if the police had promised him anything, petitioner said, "No," and then that he did not remember. (*Id.* at 65-66.) When asked if the police had frightened him in any way, petitioner said he did not remember and then, "Yes, that, that, that, I was going to, to be, ah, locked up longer. That's what I remember that you told me, right? That, that, that I was going to have more, more trouble, that's all ... if, if, if I didn't tell the truth, you told me." (*Id.* at 66.) When asked if he was being honest with the police, petitioner said, "Yes, right now, right now, I have told you everything, I have, because you told me to, right?" (*Id.* at 69.) When asked if he had made his statements voluntarily and because he wanted to, petitioner said, "Yes, well, to you all, because you told me that if I didn't you-know-what, didn't you tell me that? I, I, that's why, that's why I told you the whole truth, better you told me. That's right, I, I better tell you everything right now." (*Id.* at 69-70.)

The interrogation stopped for lunch at 11:00 a.m., resumed at 11:45 a.m., and continued until 12:45 p.m. (Tr. 138-39.) Petitioner maintained that the police had fired first and that he was not trying to kill them, but he also stated both that he

knew that he was shooting at police and that he did not know. (Tr. 510-16, 522, 608, 610-16, 619, 622, 624, 627-29, 602-03, 630-72, 757-59; Exs. 41-45, 51, 62, 105.)

After the interrogation, Detective Ford and Officer Vega drove petitioner around town so that petitioner could point out his truck and his brother's house. (Tr. 139.) They had him sign a consent form to search his truck. (Tr. 139-40.) Petitioner was jailed at 2:30 p.m., eleven hours after his arrest. (Tr. 142, 155-56.) He had been in handcuffs the entire time. (Tr. 157.)

It is uncontested that the Oregon authorities became aware of petitioner's Mexican nationality shortly after his arrest, but they did not advise petitioner at that time, or at any time thereafter, that he had the right to contact and seek assistance from the Mexican Consulate. The Oregon authorities also did not notify the Mexican Consulate that a Mexican national was in custody.

C. Pre-Trial Proceedings and Trial

Prior to trial, petitioner moved to suppress his statements to police on the grounds that the statements were (1) made involuntarily, under both the United States and Oregon Constitutions, and (2) obtained in violation of the Vienna Convention and his right to due process. (Pet. App. 1-9.)

Defense expert witness Dr. Jose LaCalle, a clinical psychologist specializing in cross-cultural Hispanic forensic psychology, evaluated petitioner and found him to be "low average" in intelligence with poor language skills even in his native language, Spanish. (Tr. 191-96.) Dr. LaCalle noted that a Spanish speaker needed an 8th or 9th grade education to understand the construction of the Spanish sentences used in the *Miranda* rights. (Tr. 220-21.) He also explained that understanding the language of *Miranda* and understanding the concept were quite different, and that the concept is unknown in many rural Latin American areas, including petitioner's, where the population greatly fears the police. Petitioner's fear of the police was realized by the beating he received from the officers. (Tr. 196-98, 219-20.)

Dr. LaCalle opined that petitioner never understood that he could refuse to answer the police and that given his low intelligence, his fear of the police, his beating at arrest by the same people who interrogated him, his lack of sleep, his

earlier substance abuse, and the length of the interrogation, petitioner's ability to understand what the police were telling him was very limited. Dr. LaCalle believed that the officers used adept and suggestive questioning to manipulate petitioner into admitting untrue statements. (Tr. 206-11, 222-24.)

The trial court ruled that petitioner's statements were voluntary and advised defense counsel that it did not want to hear argument on the Vienna Convention issue. (Tr. 231-34.) The trial court entered an order denying the motion to suppress. (Pet. App. 10-11.)

After a jury trial, petitioner was convicted of attempted aggravated murder, attempted murder, assault in the first degree, burglary in the first degree, menacing, and several weapons offenses. He was sentenced to 20½ years in prison.

D. Petitioner's Case on Appeal

Petitioner argued on appeal that his statements should have been suppressed as involuntary under both the Oregon Constitution and the Fifth and Fourteenth Amendments to the United States Constitution and because they were obtained in violation of the Vienna Convention. The Court of Appeals affirmed petitioner's conviction without opinion.

Petitioner made the same arguments before the Oregon Supreme Court, which affirmed his conviction. Relying heavily on what it believed to be a presumption against privately enforceable treaty rights and the views that the State Department had previously expressed in *United States v. Li*, 206 F.3d 56 (1st Cir. 2000), the Oregon Supreme Court concluded that the Vienna Convention does not confer individually enforceable rights. (Pet. App. 16-22.) Having found that the Vienna Convention did not create judicially enforceable rights, the Oregon Supreme Court found that a suppression motion grounded in a Vienna Convention violation "was not well taken, and the trial court did not err in denying it." (Pet. App. 22-23.) It did not address the voluntariness and *Miranda* waiver claims. (Pet. App. 15.)

Petitioner filed a timely petition for a writ of certiorari, and this Court granted the writ on November 7, 2005, limited to the Vienna Convention issues.

SUMMARY OF ARGUMENT

I. In addressing whether Article 36 of the Vienna Convention creates individual rights, the opinion below conflated three separate questions: (A) whether the Vienna Convention is self-executing in the United States, in the sense that the United States intended to implement it directly rather than through separately enacted legislation; (B) whether Article 36 of the Vienna Convention, by its terms, confers rights on individual foreign nationals; and (C) whether there is a "private right of action" to sue to enforce the treaty.

The first question, as to self-execution, is a question of the intent of the United States at the time of ratification. It is undisputed and indisputable that the United States intended the treaty to be implemented directly rather than through separate legislation. The Executive Branch explicitly stated to the Senate at the time of ratification—and continues to state today—that the Vienna Convention is entirely self-executing.

The second question, as to individual rights, is a pure question of treaty interpretation, which is governed by principles of international law. The plain text of Article 36, which expressly and repeatedly refers to the "rights" of a detained foreign national, leaves no room for doubt that the treaty creates individual rights. The unambiguous ordinary meaning of the treaty's words obviates any need to resort to secondary means of interpretation. Moreover, the treaty makes clear that the foreign consulate need not be notified if the detained national objects to notification, belying any suggestion that the provision was intended solely for the benefit of the foreign state rather than the affected individual.

At the same time, granting individuals an individual right to consular notification and access is fully consistent with the treaty purpose of facilitating the core consular function of assisting a country's nationals in protecting their rights and interests on foreign soil. The statement in the preamble that the purpose of creating "consular ... privileges and immunities" was not to benefit individuals refers on its face to the privileges and immunities of consular officials, not the rights of detained nationals, and in any event, general language of purpose in a preamble cannot prevail over the specific operative provisions of the treaty.

If there were any ambiguity in the treaty language, it would be dispelled by the *travaux préparatoires*. The *travaux* show that the language of Article 36 was amended during the negotiation process for the specific purpose of creating individual rights of consular notification and access. Although the delegates to the conference that negotiated the Vienna Convention initially debated the appropriateness of including provisions creating individual rights, it was unquestioned that the creation of individual rights was the purpose and effect of the language that the parties ultimately agreed upon.

The practice of the United States demonstrates that it shared the understanding that Article 36 creates individual rights. In treaty negotiations, at the time of signature and ratification of the Vienna Convention, and in subsequent proceedings, the United States repeatedly took the position that Article 36 creates individual rights of consular notification and access. It is only in the last few years, in the context of litigation, that the United States has taken a contrary position.

The ICJ's decisions in the *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. No. 104 (June 27), and *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Mar. 31), also make clear that the plain-language reading that Article 36 creates individual rights is correct. Even apart from the fact that the *Avena* decision is binding on the United States by treaty in cases involving Mexican nationals such as Mr. Sanchez-Llamas, the *LaGrand* and *Avena* decisions are, at a minimum, entitled to respectful consideration. The meaning of a treaty is not a question of any one country's laws; a uniform interpretation is presumptively intended. The final judgment of an international judicial body designated by many of the parties to the treaty to resolve disputes over treaty interpretation and application, even if it were not directly binding, should receive especially great weight.

The third question, as to a "private right of action," would be a question of United States federal law, but it is irrelevant to this case. Mr. Sanchez-Llamas has not brought a private action. Rather, he has invoked the treaty as a defense to a criminal prosecution to which Oregon has made him a party.

As to all three of these questions, the Court is not writing on a blank slate. In case after case from the founding of the

nation to the present day, this Court has routinely enforced, at the behest of the affected individual, treaties addressing the treatment of foreign nationals in the United States. This Court has uniformly enforced such treaties regardless of whether they were raised in criminal prosecutions, in civil litigation with the state or federal government, or in civil litigation between private parties. Nothing is different about this case. If anything, Article 36 of the Vienna Convention is far more explicit about the creation of individual rights than the treaties that the Court has enforced in the past. Under this Court's longstanding precedents, Article 36 provides the rule of decision in Mr. Sanchez-Llamas's case in the same manner as would a federal statute.

II. It is fundamental that where a right exists, there is a remedy for its violation. If a statute provides a rule safeguarding or creating individual rights, courts will give a remedy for a violation of the statute in the course of a criminal proceeding. In particular, where a statute provides procedural safeguards protecting the integrity of the criminal proceeding, this Court has regularly applied the exclusionary rule to evidence obtained in violation of the statute. The Vienna Convention, as a duly ratified treaty, is of equal dignity with a statute and operates in the same manner. Moreover, the Vienna Convention itself requires the United States to provide a judicial remedy for violations of Article 36.

The rights guaranteed by Article 36 are precisely the kind of rights for which suppression of evidence is the appropriate remedy. *First*, failure to inform an arrested foreign national of his rights as required by Article 36 eliminates the benefits of early consular assistance contemplated by Article 36. Consular officials provide essential assistance to detained nationals of their country, including helping them to understand their rights in an unfamiliar legal system, arranging for their representation where appropriate, explaining to them the respective roles of the police and of the lawyer that the police have offered to provide, and otherwise translating often complex and unfamiliar legal concepts into terms the foreign national can readily understand. The failure of the police to abide by their obligation, under Article 36, to inform the petitioner of his right to seek consular assistance gave him a

misleadingly incomplete picture of his legal options, effectively misrepresenting his legal rights and preventing him from seeking any of the benefits of consular assistance before making incriminating statements to the police.

Second, despite efforts by the State Department to publicize the requirements of Article 36, state and local officials in the United States have a troubling and persistent record of noncompliance with those requirements. If Article 36 violations had no consequences in U.S. law, law-enforcement agencies would have no incentive to comply with the rights that Article 36 creates.

Finally, the rights of consular notification and access are instrumental in protecting the basic constitutional rights—including the right against self-incrimination—of foreign nationals, who are uniquely vulnerable in an unfamiliar foreign legal system. *Miranda* warnings alone are not enough to protect these rights. The notification required by Article 36 supplements the *Miranda* warnings by advising the class of individuals of their additional right to seek assistance from someone familiar with their language and culture. The delegates who negotiated the Vienna Convention, and the President and Senate in ratifying the Convention, made a policy determination that a particular notification mechanism was the way to address these issues. That policy determination is entitled to respect by the judiciary, no less than if it were embodied in a statute enacted by Congress.

As the plaintiff in a criminal case, the state has the burden of proving the admissibility of petitioner's statements. The state has not made any attempt to show that the failure to notify petitioner of his rights of consular access caused him no prejudice. His statements should have been suppressed.

ARGUMENT

I.

THE VIENNA CONVENTION CONFERS ON PETITIONER A JUDICIALLY ENFORCEABLE INDIVIDUAL RIGHT TO CONSULAR NOTIFICATION AND ACCESS.

A. The Vienna Convention Is Self-Executing.

Although the Oregon Supreme Court's opinion uses the term "self-executing" (Pet. App. 18), the state has not disputed

that the Vienna Convention is self-executing in the sense of being implemented directly in the United States rather than through separate legislation.

The Supremacy Clause of the Constitution provides that "*all* Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI (emphasis added). This represents a deliberate departure from the traditional British view that the legislature alone is responsible for implementing treaties in domestic law. Chief Justice Marshall, writing for the Court, described the difference as follows:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> *In the United States a different principle is established.* Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.

Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (emphasis added). Thus, a ratified treaty has a dual character: on the international plane, it is a compact between nations, while in United States domestic law, it is the equivalent of a statute. *See, e.g., United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) ("where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress").

The exception to the rule that treaties operate directly in U.S. domestic law occurs where a treaty calls for performance of a legislative act. In that case, there is nothing for the courts to enforce until Congress "execute[s]" the treaty by enacting the contemplated legislation. *Foster*, 27 U.S. (2 Pet.) at 314; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(4) (listing limited circumstances in which treaties are non-

self-executing). *See also Percheman v. United States*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (holding treaty at issue in *Foster* to be self-executing; overruling contrary conclusion in *Foster*). *See generally* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 697-704 (1995).

"Self-execution" or "non-self-execution" is a question of United States constitutional law, not international law, because treaties do not normally address how they will be implemented in each nation's domestic legal structure. *See, e.g.*, RESTATEMENT, *supra*, § 111 cmt. h. Whether a treaty will be applied directly, or, on the contrary, will be implemented through separate legislation enacted by Congress, is primarily a question of the intention of the United States at the time of ratification. *Id.* § 111 cmt. h & reporter's note 5; *see also, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (treaty explicitly declared non-self-executing at time of ratification "did not itself create obligations enforceable in the federal courts" though it "bind[s] the United States as a matter of international law"); *Percheman*, 32 U.S. (7 Pet.) at 88-89 (treaty was self-executing where treaty language did not indicate that legislation was contemplated).

It is undisputed that the United States understood that the Vienna Convention would be effective without implementing legislation. When presenting the Vienna Convention to the Senate for its advice and consent, the Executive Branch explicitly represented that the obligations imposed by the Convention were "entirely self-executive and do[] not require any implementing or complementing legislation." *See Vienna Convention on Consular Relations, Hearing Before Senate Committee on Foreign Relations*, S. EXEC. REP. NO. 91-9, at 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Dep't of State). In a booklet currently provided to state and local law-enforcement agencies, the State Department advises that "[i]mplementing legislation is not necessary (and the VCCR and bilateral agreements are thus "*self-executing*") because executive, law enforcement, and *judicial authorities* can implement these obligations through their existing powers." U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 44 (emphasis added), *available at* http://travel.state.gov/pdf/CNA_book.pdf (last accessed

Dec. 20, 2005). Moreover, the rights conferred and obligations imposed by Article 36 of the Vienna Convention operate, by their nature, in the context of criminal proceedings, and thus are fully capable of judicial enforcement without separate legislation. *See, e.g., Percheman*, 32 U.S. (7 Pet.) at 88, 89.

For these reasons, it is indisputable that the Vienna Convention is self-executing in the sense that it does not require any separate act of Congress to be effective as United States law. *See, e.g., Jogi v. Voges*, 425 F.3d 367, 376-78 (7th Cir. 2005) (Vienna Convention is self-executing); Amicus Brief for United States at 26, *Medellín v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928) (it is "the accepted understanding that the Vienna Convention is self-executing").

B. Article 36 of the Vienna Convention Creates Individual Rights.

Because the Vienna Convention on Consular Relations is an agreement between sovereign nations, its interpretation is a question of international law.[2] Applying international-law principles of treaty interpretation, as recognized and adopted by this Court's prior decisions, it is clear that Article 36 creates individual rights.

1. The Ordinary Meaning of the Plain Terms of Article 36 Makes Clear That Article 36 Creates Individual Rights.

A treaty is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties ("VCLT"), May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340;[3]

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[2] *See, e.g., Nuru v. Gonzalez*, 404 F.3d 1207, 1221 n.9 (9th Cir. 2005); *Chubb & Son, Inc. v. Asiana*, 214 F.3d 301, 307 (2d Cir. 2000); RESTATEMENT, *supra*, § 301(1); *cf. Kansas v. Colorado*, 206 U.S. 46, 95 (1907) (in dispute between two states, neither can apply its own law).

[3] Although the United States has not ratified the VCLT, both the executive branch and the courts have accepted its provisions relating to treaty interpretation as a codification of customary international law. *See, e.g., Avero Belg. Ins. v. Am. Airlines*, 423 F.3d 73 (2d Cir. 2005); *Aquamar S.A. v. Del Monte Fresh Produce*, 179 F.3d 1279, 1296 n.40 (11th

(footnote continued)

accord RESTATEMENT, *supra*, § 325(1). As this Court has recognized, "[i]nterpretation of the ... Treaty ... must, of course, begin with the language of the Treaty itself. The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 180 (1982) (citation omitted). In considering the context in which the treaty is made, the Court should give due regard to its character as an agreement among nations, recognizing the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks*, 470 U.S. 392, 399 (1985).

The plain terms of Article 36 of the Vienna Convention provide for individual rights of consular notification and access. Paragraph 1 of that article provides, in part, that:

> The said authorities [of the country detaining a foreign national] shall inform the person concerned without delay of *his rights* under this sub-paragraph.

Vienna Convention art. 36(1)(b) (emphasis added). It also provides that:

> Nationals of the sending State shall have *the same freedom* with respect to communication with and access to consular officers of the sending State [as consular officers of the sending State have with respect to communication with their nationals].

Id. art. 36(1)(a) (emphasis added). Paragraph 2 of Article 36 provides that:

> *The rights* referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations

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Cir. 1999); U.S.'s Objection to Jurisdiction at 17 & n.86, *Tembec Inc. v. United States* (NAFTA Feb. 4, 2005), *available at* http://www.state.gov/s/l/c11070.htm (last accessed Dec. 20, 2005); Letter from Sec'y of State William P. Rogers to Pres. Richard M. Nixon, Oct. 18, 1971, reprinted in S. EXEC. DOC. L, 92nd Cong., 1st Sess., at 1 (1971); *see also Weinberger v. Rossi*, 456 U.S. 25, 30 n.5 (1982) (citing VCLT).

> must enable full effect to be given to the purposes for which *the rights* accorded under this Article are intended.

Id. art. 36(2) (emphasis added). Thus, as numerous courts in the United States have concluded, Article 36 of the Vienna Convention creates individual rights by its plain terms. *See, e.g., Jogi*, 425 F.3d at 378-84; *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002); *Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001); *United States v. Superville*, 40 F. Supp. 2d 672, 677 (D.V.I. 1999); *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 77-78 (D. Mass. 1999); *see also Breard v. Greene*, 523 U.S. 371, 376 (1998) (Article 36 "arguably" confers individual rights). Conversely, the suggestion in the opinion below that Article 36 may have used the term "rights" because it was "convenient" to use that term although the parties to the Vienna Convention really meant something else (Pet. App. 20-21) fails to comport with the requirement that the words of a treaty be interpreted in accordance with their ordinary meaning.

Article 36 contains yet another dispositive indication that the provision confers rights on the detained national as well as the sending State. Article 36(1)(b) requires consular notification only "if [the detained individual] so requests." In other words, by its terms, Article 36 allows a detained individual to decline consular notification—a provision that is inconsistent with the understanding that the rights in Article 36 are for the protection only of the foreign state and not the individual. *See, e.g., Jogi*, 425 F.3d at 382-83 ("This indicates that the right conferred by Article 36 belongs to the individual, not to the respective governments.").

2. The Vienna Convention's Purpose Confirms That Article 36 Creates Individual Rights.

The plain language of the Vienna Convention conferring these individual rights is fully consistent with the purpose of the Convention "to ensure the efficient performance of functions by consular posts on behalf of their respective States." Vienna Convention, preamble, para. 5. A nation's ability to provide effective consular assistance is impaired if its citizens are not informed of their right to consular access, are denied such access, or are not given an effective remedy for

violation of these rights. As this Court has recognized, "a treaty should generally be 'construe[d] ... liberally to give effect to the purpose which animates it' and ... '[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.'" *United States v. Stuart*, 489 U.S. 353, 368 (1989) (quoting *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940)); *accord Asakura v. Seattle*, 265 U.S. 332, 342 (1924); *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1880). Contrary to what the decision below suggests, there is no inconsistency between the Vienna Convention's goal of facilitating consular functions—which include providing assistance to nationals in protecting their rights and interests—and a provision conferring on those individual nationals a personal right to seek consular assistance as a means of achieving that goal.[4]

In its brief to the Oregon Supreme Court, the State contended that the preamble to the Vienna Convention negated the rights conferred by Article 36. (*See* Pet. App. 21 n.7 (stating that court was "unimpressed" by state's argument)). The language relied upon by the state refers to "*consular* ... privileges and immunities," and recites that "the purpose of *such* privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts." Vienna Convention, preamble, paras. 4-5 (emphasis added).[5] It says nothing about the rights of detained

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[4] *See, e.g.*, Vienna Convention art. 5(a) (consular function includes "protecting in the receiving State the interests of the sending State and of its nationals"); *id.* art. 5(e) (consular function includes "helping and assisting nationals ... of the sending State").

[5] The preamble recites that the Convention was entered into "[b]elieving that an international convention on *consular relations, privileges and immunities* would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems," and "[r]ealizing that the purpose of *such* privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." Vienna Convention, preamble, paras. 4-5 (emphasis added). This language is taken almost verbatim from the earlier Vienna Convention on Diplomatic Relations, which contains

(footnote continued)

foreign nationals. The term "consular privileges and immunities" is widely understood to mean the special protections attaching to consular officials, their family members, and property of the consulate. *See* 1 OPPENHEIM'S INTERNATIONAL LAW 1143-51 (R. Jennings & A. Watts 9th ed. 1992). Such official consular privileges and immunities appear throughout the Vienna Convention. *See* Vienna Convention arts. 31, 32, 33, 35, 40, 41, 43, 44, 46, 47, 48, 49, 50, 51, 52. Indeed, every use of the phrase "privileges and immunities" in the operative provisions of the Convention unambiguously refers solely to the privileges and immunities of consular or diplomatic personnel and property. *Id.* arts. 15(4), 17(1), 24(1)(d), 45(1), 53(1)-(3), (5), 55(1), 57(2), 58(1)-(3), 69(2), 70(4) & 71(1)-(2). In contrast, Article 36 explicitly refers to "rights" of a detained foreign national. *Id.* art. 36.

A number of courts in the United States have recognized that the recital in the preamble does not override the plain language of Article 36, but merely "emphasiz[es] that the Convention is not designed to benefit [consular officials] in their individual capacity, but rather to protect them in their official capacity." *Jogi*, 425 F.3d at 381 (citing *United States v. Rodriguez*, 68 F. Supp. 2d 178, 182 (E.D.N.Y. 1999), and Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 594 (1997)); *accord Standt*, 153 F. Supp. 2d at 425 ("[T]he Preamble's reference to 'individuals' is best understood as referring to consular officials rather than civilian foreign nationals."); *see also* Pet. App. 21 n.7 ("It is at least arguable that the emphasized clause refers to privileges and immunities of individual consular officials and that, as such, it says nothing about the rights of individual foreign detainees."). The preamble makes clear that the purpose of consular privileges and immunities in the Vienna Convention was not to make foreign consular officials a privileged class, but it has no

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analogous provisions in regard to the privileges and immunities of diplomats. *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, preamble, paras. 3-4, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

bearing on the individual rights of detained persons as guaranteed by Article 36.

In any event, even if there were an inconsistency between Article 36 and the preamble, the specific language of Article 36, an operative provision that expressly recognizes individual rights, would prevail over the general statement of purpose in the preamble. In the context of statutory interpretation, this Court has made clear that statements of general purpose, as in a preamble or title, must give way to specific operative statutory text.[6] The same principle also applies to the interpretation of a treaty. *See, e.g., LaGrand* ¶ 77 (citing authority); RESTATEMENT, *supra*, § 325 reporter's note 4 ("object and purpose" of treaty does not trump intent as expressed in operative words of agreement); *see also Trans World Airlines Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) (general canons of statutory and contractual interpretation may be useful in construing treaties). In accord with that general principle of interpretation, a number of courts in this country have independently recognized, in regard to Article 36, that "[i]t is a mistake ... to allow general language of a preamble to create an ambiguity in specific ... treaty text where none exists." *Jogi*, 425 F.3d at 381; *accord, e.g., Hongla-Yamche*, 55 F. Supp. 2d at 77 (Article 36 operative text is "a more persuasive source for determining the parties' intent" than preamble); *Superville*, 40 F. Supp. 2d at 677 ("[A]lthough the treaty ... was not specifically designed 'to benefit individuals,' ... the text of article 36 enshrines a personal right to consular access ....").

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[6] *See, e.g., Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 483 (2001) (clear text "eliminates the interpretive role of the title, which may only shed light on some ambiguous word or phrase in the statute itself") (internal quotations omitted); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524-25 (1989) (specific statutory provision prevails over general provision); 2A STATUTES AND STATUTORY CONSTRUCTION § 47.04, at 221-22 (Norman J. Singer 6th ed. 2000) ("The preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.").

3. The Vienna Convention's *Travaux Préparatoires* Confirm That Article 36 Creates Individual Rights.

Article 32 of the VCLT states that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work [*travaux préparatoires*] of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable.

1155 U.N.T.S. at 340. As this Court has recognized, "[s]hould the operative text present 'difficult or ambiguous passages,' the Court may '"look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties."'" *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694, 700 (1988) (quoting *Air France v. Saks*, 470 U.S. at 396 (1985), and *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943)); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (treaty "negotiating and drafting history (*travaux preparatoires*)" is "traditionally considered as aid[] to interpretation"); *see also Standt*, 153 F. Supp. 2d at 425 (even if preamble created ambiguity in Article 36, ambiguity could be resolved by resort to "outside interpretive sources such as the travaux preparatoires").

Article 36 of the Vienna Convention on Consular Relations contains no ambiguity that would require resort to the treaty's *travaux préparatoires*, but in any event, the *travaux* fully "confirm the meaning resulting from the application of" the treaty's plain language and purpose. VCLT, art. 32.

The Vienna Convention was the product of the United Nations Conference on Consular Relations, held in Vienna from March 4 through April 22, 1963. At the conference, representatives of the governments of 92 nations met to negotiate the Convention, a proposed draft of which had been prepared by the International Law Commission.

Although the Conference extensively debated various terms of Article 36, and the view that its language operated to confer rights on individual foreign nationals was widely voiced, that view went unchallenged. For example, Spain's delegate observed that "[t]he right of the nationals of a sending State to communicate with and have access to the consulate and consular officials of their own country ... [i]s one of the most *sacred rights of foreign residents* in a country." *Official Records*, vol. I, U.N. Conference on Consular Relations, 2d Comm., 15th mtg., at 332, ¶ 36, U.N. Doc. A/CONF.25/16 (Mar. 4-Apr. 22, 1963) (emphasis added) [hereinafter "Conf. I"]. The delegate from India emphasized that "the right given to consulates *implied a corresponding right for nationals.*" *Id.* at 333, ¶ 50 (emphasis added). The South Korean delegate stated that "the receiving State's obligation under [Article 36(1)(b)] was extremely important, because it related to one of the *fundamental and indispensable rights of the individual.*" *Id.* at 338, ¶ 11 (emphasis added).

At the conference, the Venezuelan delegate proposed deleting Article 36(1)'s reference to a foreign national's freedom to communicate with his consulate precisely because it created individual rights. *See* U.N. Doc. A/CONF.25/C.2/L.100 (proposed amendment), *Official Records*, vol. II, U.N. Conference on Consular Relations, at 84, U.N. Doc. A/CONF.25/16/Add.1 (Mar. 4-Apr. 22, 1963) [hereinafter "Conf. II"]. The countries supporting this amendment regarded it as inappropriate for a consular convention to "defin[e] *the rights of the nationals* of the sending States." Conf. I, 2d Comm., 15th mtg., at 332, ¶ 37 (comments of Kuwaiti delegate supporting Venezuela amendment); *see also* Conf. I, 2d Comm., 15th mtg., at 331, ¶ 32 (comments of Venezuelan delegate). Ultimately, Venezuela withdrew its proposal in the face of strong opposition from other nations. *See* Conf. I, 2d Comm., 15th mtg., at 333-34, ¶¶ 49-54 (objections to Venezuela's proposal); Conf. I, 2d Comm., 16th mtg., at 334, ¶ 2 (withdrawal of proposal).

The requirement that a detained foreign national be informed of his or her right to contact the consulate, which is at issue here, is the result of an amendment offered by the United Kingdom. U.N. Doc. A/CONF.25/L.50, *reprinted in*

Conf. II, at 171. The U.K delegate argued that failure to include such a provision:

> could well make the provisions of article 36 ineffective because the person arrested might not be aware of *his rights*.... For those reasons, ... it was essential to introduce a provision to the effect that the authorities of the receiving State should inform the person concerned without delay of *his rights*....

Conf. I, 20th plen. mtg., at 83-84, ¶ 73 (emphasis added). Ultimately, the U.K. amendment was adopted by a wide margin, with the United States voting in favor. Conf. I, 20th plen. mtg., at 86-87, ¶ 108.

The United Kingdom also proposed the language at the end of Article 36(2) that makes the enforcement of Article 36(1) under national laws "subject to the proviso ... that the laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended." U.N. Doc. A/CONF.25/C.2/L.107, *reprinted in* Conf. II, at 85. Some Soviet Bloc delegates complained that this amendment would interfere with each country's criminal process by conferring additional rights on foreign nationals accused of crimes. Conf. I, 2d Comm., 19th mtg., at 347-48, ¶¶ 3, 6-9 (comments of delegates of Romania, Ukraine, and U.S.S.R.). The U.K. delegate responded that that objection was not legitimate because "after all it was precisely with *aliens and their rights* that Article 36 was concerned." *Id.* at 348, ¶ 10 (emphasis added). The U.K. delegate later reiterated that the amendment was important because it was "essential that [Article 36] should lay down clear and unequivocal rights and obligations." Conf. I, 12th plen. mtg., at 40, ¶ 6. The U.K. amendment was adopted by a wide margin, without a roll-call vote. Conf. I, 2d Comm., 19th mtg., at 348, ¶ 10.

The United States offered an amendment of its own, which would have added language to Article 36(1)(b) providing that the consulate should be notified of a national's detention "at the request of [the] national." U.N. Doc. A/CONF.25/C.2/L.3, *reprinted in* Conf. II, at 73. The purpose of this amendment was "to protect the rights of the national concerned," Conf. I, 2d Comm., 16th mtg., at 337, ¶ 39, apparently out of concern that citizens of totalitarian countries might not want their

governments notified of their arrest or detention abroad. The United States also endorsed a similar amendment offered by another group of nations, praising it for "recogniz[ing] the freedom of action of the detained persons." Conf. I, 11th plen. mtg., at 38, ¶ 21. The final version of the language was adopted as part of a proposal offered by a different group of nations, with the United States voting in favor. *See* U.N. Doc. A/CONF.25/L.49, *reprinted in* Conf. II, at 171; Conf. I, 20th plen. mtg., at 87, ¶ 109. This history confirms that the United States fully shared the common understanding that Article 36 creates individual rights.

The *travaux* thus make clear that the signatories of the Vienna Convention were fully aware of the implications of the provisions that are at issue in this case, and were remarkably unanimous in their view that Article 36, as ultimately adopted, conferred rights on individual nationals of a sending State that could affect the criminal process. The view that prevailed was that Article 36 ought to define and protect "clear and unequivocal rights" of nationals of the sending State and articulate the "obligations" of the receiving State to protect those rights. Conf. I, 12th plen. mtg., at 40, ¶ 6 (statement of U.K. delegate); *see also Jogi*, 425 F.3d at 382 ("The negotiation history of Article 36 is replete with concern about the question of individual rights."); *Standt*, 153 F. Supp. 2d at 425 ("[D]ebates on the VCCR reflect widespread concern with the question of individual rights.").

4. The Contemporaneous View and Subsequent Practice of the United States Government Has Been That Article 36 Creates Individual Rights.

The report of the United States delegation to the Vienna conference was fully consistent with its position at the conference that Article 36 creates individual rights:

> The solution adopted by the Conference to the problem of adjusting the notification obligations of the receiving State to the *right* of the individual concerned to request notification lies in the final sentence of subparagraph 1(b). That sentence requires authorities of the receiving State to inform the person detained of his *right* to have the fact of his detention

> reported to the consular post concerned and of his *right* to communicate with that consular post.

Report of the United States Delegation, supra, at 61 (emphasis added). The letter of the Secretary of State transmitting the proposed convention to the President summarizes Article 36(1)(b) in the same terms:

> It requires that authorities of the receiving State inform the person detained of his *right* to have the fact of his detention reported to the consular post concerned and his *right* to communicate with that consular post. *If he so requests,* the consular post shall be notified without delay.

Letter from Secretary of State William P. Rogers to President Richard M. Nixon, Apr. 18, 1969, *reprinted in* S. EXEC. DOC. E, 91-9, 91st Cong., 1st Sess., at vi (1969) (emphasis added).

The United States unmistakably confirmed its understanding when it appeared before the ICJ in 1979 in response to the takeover of the United States embassy in Tehran and the ensuing hostage crisis. In the ICJ, the United States argued, among other things, that Iran had breached its duties under Article 36, which, according to the United States,

> *establishes rights* not only for the consular officer, but perhaps even more importantly, *for the nationals of the sending State* who are assured access to consular officers and through them to others.

Memorial of the United States, *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran),* 1980 I.C.J. Pleadings at 174 (emphasis added) [hereinafter *"Tehran Hostages"*].

The State Department has held that view to this day. In the Foreign Affairs Manual that it issues to United States diplomatic and consular officials abroad, the State Department advises that "Article 36 of the VCCR provides that the host government must notify a foreign national arrestee without delay of *the arrestee's right* to communicate with his or her consular officials." 7 FAM § 421.1-1 (2004) (emphasis added), available at http://www.foia.state.gov/REGS/Search.asp (last accessed Dec. 20, 2005). The State Department's manual for law enforcement officers in the United States also refers to a "right" of consular notification. *See* U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS, *supra,* at 2.

The Justice Department has expressed the same view. In 2004, the Attorney General represented to the Mexican Government, in the case of a detained Mexican national who had not yet been tried, that

> [c]onsistent with the opinion of the International Court of Justice in [*Avena*], [the individual] is free to argue in the trial court that his rights under Article 36 of the Vienna Convention were violated by a failure to inform him of his right to contact his consulate once it was realized that he was a foreign national or there were grounds to think that he was probably a foreign national and to argue that prejudice resulted....

Letter of Att'y Gen. John Ashcroft to Amb. Carlos de Icaza, June 3, 2004, at 2 (appended to Brief of Mexico as *Amicus Curiae*).

The United States departed from this long-held view in *United States v. Li*, 206 F.3d 56 (1st Cir. 2000), in which, as a litigant, it took the position that the Vienna Convention created no individual rights.[7] The unilateral view of the executive branch is not controlling in any case, because the interpretation of a treaty depends on the intent of the parties as expressed in the language of the treaty and not the later-adopted view of a single party to the treaty. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 602 (6th ed. 2003). Courts must "interpret treaties for themselves" and not simply rubber-stamp the interpretation proffered by

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[7] The *Li* court cites two earlier State Department statements, but those statements, as quoted by the *Li* court, say nothing about issues of individual rights. Rather, the quoted statements merely indicate the State Department's view that (1) the departures from existing practice required by the Vienna Convention are not "significant," and (2) a particular foreign national's conviction and sentence were not affected by the Vienna Convention violation in his case. *Li*, 206 F.3d at 63-64. The *Li* court's inference from these statements that the State Department's position on the individual-rights question dates back to the 1970s – and the Oregon Supreme Court's adoption of that inference – is plainly mistaken, as the U.S. brief in the *Tehran Hostages* case, among other sources, makes clear.

the government. *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). Although the consistently held views of the federal executive branch on the proper interpretation of a treaty provision would normally be entitled to "great weight," *id.*, those views are not binding on the courts. *See, e.g., id.* (adopting government's interpretation after independent review of treaty); *Perkins v. Elg*, 307 U.S. 325 (1939) (rejecting government's interpretation of treaty); *Factor v. Laubenheimer*, 290 U.S. 276, 294 (1933) (adopting government's interpretation after independent review of treaty; government's construction was "of weight" but "not conclusive"); *Johnson v. Browne*, 205 U.S. 309, 318-20 (1907) (same). No weight at all is due here, however, because the government has simply repudiated its long-maintained understanding of the meaning of the relevant provision in order to bolster its current litigating position. *See* RESTATEMENT, *supra*, § 326 reporter's note 2.

5. The ICJ Has Concluded That Article 36 Creates Individual Rights.

In the *LaGrand Case*, the ICJ explicitly held that "Article 36, paragraph 1, creates individual rights." *LaGrand* ¶ 77. The *LaGrand* court relied on Article 36(1)(b) of the Vienna Convention, which refers to the obligation to notify "the person concerned without delay of *his rights* under this subparagraph" (emphasis added) and on Article 36(1)(c), which provides the national with the right to refuse consular assistance. *See id.* The ICJ found no need to turn to external sources, because "[t]he clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand." *Id.* In *Avena*, the ICJ reaffirmed *LaGrand*'s holding that Article 36 creates individual rights. *See Avena* ¶ 40.

In *Avena*, in response to Mexico's request for relief, the ICJ expressly ruled that its holdings would apply to future cases in which Mexican nationals were sentenced to severe penalties in proceedings in which their Article 36 rights had been violated. *Avena* ¶ 153(11). The final judgment in *Avena*, a case between the United States and Mexico in which both States fully participated, is—by treaty—a binding interpretation of the Vienna Convention insofar as it concerns nationals of

Mexico arrested or detained in the United States.[8] *See generally* Brief of Mexico as *Amicus Curiae*.

The Court need not, however, decide whether the *Avena* judgment is directly binding in this case. As discussed above, the ICJ's decision is fully supported by the plain language and purpose of the treaty, and at a minimum, courts in the United States should give "respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret [it]." *Breard*, 523 U.S. at 375; *see also Jogi*, 425 F.3d at 384 (quoting *Breard*; citing *LaGrand* and *Avena* as reinforcing conclusion that Article 36 creates individual rights). Moreover, "it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently." *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting); *see also id.* at 655 n.9 (majority opinion) (not disputing point, but distinguishing foreign cases). After all, "treaties are made, not by only one of the contracting parties, but by both," THE FEDERALIST No. 64, at 394 (John Jay) (Clinton Rossiter ed. 1961), or, in the case of a multilateral treaty, by all. Indeed, the Vienna Convention was adopted in order to "further friendly relations between nations through the orderly development of *uniform* standards of consular practice." S. EXEC. REP. No. 91-9, at 3 (1969) (report of Sen. Fulbright) (emphasis added); *see also Report of the United States Delegation* at 41.

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[8] *See* Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, art. 1, 21 U.S.T. 325, T.I.A.S. No. 6820, 596 U.N.T.S. 487 (giving ICJ jurisdiction over disputes arising under Vienna Convention); U.N. CHARTER, art. 94(1), 59 Stat. 1031 ("Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899) ("[A]n award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned ...."); *cf. Eastern Assoc. Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57, 62 (2000) (where parties agree to arbitrate contractual dispute, "the arbitrator's award [must be treated] as if it represented an agreement between [the parties] as to the proper meaning of the contract").

The presumption in favor of uniform treaty interpretation should apply with special force here, where some 46 nations party to the Convention, including the United States and Mexico, adopted the Optional Protocol to the Vienna Convention designating a single forum for binding resolution of disputes concerning the Vienna Convention's interpretation and application, and where the ICJ issued its interpretation in a case in which the United States was a party and fully participated. The ICJ itself recognized its responsibility to ensure the uniform interpretation of the Vienna Convention. In a concluding paragraph of its judgment in *Avena*, it stated that it had approached the case "from the viewpoint of the general application of the Vienna Convention" and advised that its interpretation and application of the Convention would apply in any future case between parties to the Convention. *Avena* ¶ 151. Courts of other nations that are parties to the Vienna Convention, even those that are not parties to the Optional Protocol, have followed *LaGrand* and *Avena* on the point that Article 36 creates individual rights. *See, e.g., Khadr v. Canada (Minister of Foreign Affairs)*, 123 C.R.R.(2d) 7, 23 (Fed. Ct. 2004) (Canada) (citing *LaGrand* for the point that "the VCCR does create individual rights" to consular assistance). And numerous foreign nations, in their filings as *amici curiae* in this case, have endorsed the position that the Vienna Convention creates individual rights.

C. The Existence of a "Private Right of Action" Is Not at Issue Here.

The opinion below confuses the existence of an individual right under the Vienna Convention with the existence of a "private right of action" under United States law. Recognizing that each country's domestic legal structure is distinct, treaties themselves rarely create explicit causes of action. Rather, treaty rights are routinely asserted in the context of legal proceedings that arise under a cause of action created by United States domestic law.

In particular, this Court has consistently enforced treaties that did not themselves create domestic judicial remedies, where either (1) the treaty right was raised as a matter of defense, or (2) the habeas corpus statute or other domestic law provided a right of action. *See e.g., Asakura*, 265 U.S. at 343-44

(equitable action for injunction); *Johnson v. Browne*, 205 U.S. 309, 320-22 (1907) (habeas corpus); *United States v. Rauscher*, 119 U.S. 407, 418-19 (1886) (defense to indictment). *See generally* Carlos M. Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1143-50 (1992). Because the State of Oregon has brought this criminal prosecution to take away Mr. Sanchez-Llamas's liberty, he may assert as a defense any rights that he has under applicable law, including the Vienna Convention.[9] Conversely, whether the treaty creates a "private right of action" is irrelevant, because petitioner has not brought a private action. *See, e.g., Rauscher*, 119 U.S. at 419 (treaty creating individual rights implies judicial obligation to "enforce in any appropriate proceeding the rights of persons growing out of that treaty").

D. This Court Has Routinely Held That Treaties Addressing the Treatment of Foreign Nationals in the United States Create Judicially Enforceable Individual Rights.

Mr. Sanchez-Llamas may raise the Vienna Convention in this proceeding because (A) the Convention is self-executing; (B) it creates individual rights; and (C) those rights are at issue in a judicial proceeding to which he is a party. The Court need not start from first principles on those points, however, because it has from the beginnings of the Republic decided the same issues in favor of judicially enforceable individual rights.

"Treaties for the protection of citizens of one country residing in the territory of another are numerous and make for good understanding between nations." *Asakura*, 265 U.S. at

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[9] *Argentine Republic v. Amerada Hess Shipping*, 488 U.S. 428 (1989), cited by the Oregon Supreme Court, is inapposite. That case merely held that a treaty creating substantive obligations could not be construed as an express waiver of sovereign immunity, because the creation of a sovereign obligation does not necessarily imply the creation of a right to sue. *Id.* at 442-43. No such issue is present here, because Mr. Sanchez-Llamas has not sued the State of Oregon. *See Poindexter v. Greenhow*, 114 U.S. 270, 286 (1885) (although Eleventh Amendment would bar suit against state to enforce bond coupons, it does not bar individual from asserting, as defense to suit by state, that tax could be paid in coupons).

341.[10] This Court has regularly given effect to such treaties at the behest of the affected foreign nationals.[11] In effect, the

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[10] *See also, e.g., Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 185 n.13, 186 n.14 (1982) (listing examples of treaties protecting foreign citizens' rights beginning with 1778 treaty between United States and France); *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941) ("One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country.").

[11] *See, e.g., Kolovrat v. Oregon*, 366 U.S. 187 (1961) (enforcing Yugoslav citizens' right under U.S.-Serbia treaty to inherit personal property located in Oregon); *Clark v. Allen*, 331 U.S. 503, 507-08 (1947) (enforcing German citizens' right to inherit property under U.S.-Germany treaty despite existence of state of war); *Bacardi*, 311 U.S. at 161-62 (enforcing foreign trademark owner's rights under multilateral trademark treaty); *Cook v. United States*, 288 U.S. 102 (1933) (dismissing forfeiture proceeding brought in violation of U.S.-Great Britain treaty); *Nielsen v. Johnson*, 279 U.S. 47 (1929) (enforcing Danish citizen's right under U.S.-Denmark treaty to be free of discriminatory taxation); *Jordan v. Tashiro*, 278 U.S. 123 (1928) (enforcing U.S.-Japan treaty allowing Japanese citizens to conduct trade); *Cheung Sum Shee v. Nagle*, 268 U.S. 336 (1925) (holding that U.S.-China treaty prevented mandatory exclusion of wives and minor children of Chinese merchants under Immigration Act of 1924); *Asakura*, 265 U.S. at 341-42 (restraining city from applying law that noncitizens could not work as pawnbrokers to Japanese citizens because it would violate U.S.-Japan treaty); *Johnson v. Browne*, 205 U.S. 309, 320-22 (1907) (affirming grant of habeas corpus to individual imprisoned in violation of U.S.-Canada extradition treaty); *Geofroy v. Riggs*, 133 U.S. 295 (1890) (enforcing treaty granting French citizens right to own real property); *Rauscher*, 119 U.S. at 418-20 (holding that indictment violating U.S.-U.K. extradition treaty must be dismissed); *Chew Heong v. United States*, 112 U.S. 536 (1884) (granting habeas corpus to block deportation of Chinese laborer that would violate U.S.-China treaty); *Hauenstein v. Lynham*, 100 U.S. 483 (1880) (enforcing treaty assuring Swiss citizens' right to inherit property); *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489 (1824) (enforcing British land owner's rights under treaty); *Soc'y for Propagation of Gospel v. New-Haven*, 21 U.S. (8 Wheat.) 464 (1823) (same); *Craig v. Radford*, 16 U.S. (3 Wheat.) 594 (1818) (same); *Chirac v. Chirac's Lessee*, 15 U.S. (2 Wheat.) 259 (1817) (enforcing treaty granting French citizens right to hold real property); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (enforcing treaty protecting British property owners against Virginia forfeiture); *Higgonson v. Mein*, 8 U.S. (4 Cranch)

(footnote continued)

Court has recognized that a private person has a right to invoke a treaty whenever the treaty confers rights on an identifiable group or imposes an obligation on the government that benefits an identifiable group, and the party invoking the treaty belongs to that group. *See supra* note 11; *cf. Ass'n of Data Process Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (question of standing "concerns ... whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"). The language of Article 36 is no less explicit about the existence of individual rights than the treaty language that this Court has routinely found to confer judicially enforceable individual rights.[12]

The Oregon Supreme Court's contrary holding rests on the notion that treaties are presumed *not* to create judicially enforceable individual rights in the absence of a clear and explicit statement to the contrary. (Pet. App. 20-22.) There is no such presumption. Indeed, any such presumption would squarely contradict an unbroken line of cases from this Court enforcing individual rights whenever the text of the treaty provides a rule by which the rights of an individual may be

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415, 419 (1808) (enforcing treaty protecting British creditor from cancellation of lien by Georgia); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454 (1806) (enforcing treaty protecting British creditor from cancellation of debt by Virginia); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (enforcing treaty requiring return of ship to French owner); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (enforcing treaty protecting British creditor from cancellation of debt by Virginia).

[12] *See Medellín v. Dretke*, 125 S. Ct. 2088, 2104 (2005) (O'Connor, J., dissenting) (Article 36 is no less explicit about individual rights than the treaty in *Kolovrat*, 366 U.S. at 192 & n.6, or *Asakura*, 265 U.S. at 340; no "special magic words" have been required); *see also Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) (Vienna Convention "arguably confers" an individual right). For example, much like Article 36, the treaties that the Court enforced in *Kolovrat* and *Asakura* referred to "rights" or "liberty" without any specific reference to judicial enforcement. *See Kolovrat*, 366 U.S. at 192 & n.6 (Serbian citizens "shall enjoy the rights which the respective laws grant ... to the subjects of the most favored nations"); *Asakura*, 265 U.S. at 340 (Japanese citizens "shall have liberty to ... carry on trade, wholesale and retail," in the United States).

determined. *See, e.g., Kolovrat*, 366 U.S. at 196; *Bacardi*, 311 U.S. at 162-63; *Asakura*, 265 U.S. at 342; and other cases cited *supra* note 11.

In support of the proposed presumption against individual rights, the Oregon Supreme Court relied largely on a mistaken reading of the *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580 (1884). There, this Court addressed a congressional statute imposing a tax on immigration, which was alleged to conflict with a customs treaty between the United States and Russia. *Id.* at 597. The precise issue before the Court was whether the later-in-time federal statute prevailed over the earlier treaty. *Id.* at 599. Holding that it did, the Court first explained:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Id. at 598. At the same time, the Court also confirmed:

> *But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal* [meaning "domestic"] *law*, and which are capable of enforcement as between private parties in the courts of the country.... A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Id. at 598-99 (emphasis added). The Court observed, however, that nothing in the Constitution makes treaties irrepealable or unchangeable, or gives them superiority over federal statutes. *Id.* at 599. As a result, the Court concluded:

> [W]e are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.

112 U.S. at 599.

The Court thereby recognized two complementary principles. *First*, the Court recognized that all treaties establishing principles by which individual rights could be judged must be enforced without implementing legislation. It did not question that the treaty, without more, would be judicially enforceable. *See id.* at 598-99. *Second*, the Court recognized that even though the treaty was self-executing, its effect in domestic law could be abrogated by a later-adopted act of Congress, which would have equal status under the Supremacy Clause. *Id.* at 599. If the later federal statute caused the United States to breach the international obligations embodied in the earlier treaty, the courts' duty would remain clear—to enforce the later statute, regardless of the effect on the international plane. But where, as here, the treaty contained provisions "by which the rights of the private [foreign] citizen or subject may be determined," and there is no later, abrogating statute, the courts' duty remains equally clear—to apply the treaty as the "rule of decision" just as if it were a statute. *Id.* Thus, far from supporting the Oregon Supreme Court's presumption against individual rights, the quoted language from the *Head Money Cases* reaffirms this Court's consistent holding that United States courts will not hesitate to enforce a treaty containing provisions in the nature of individual legal rights.

Similarly, a long line of this Court's precedents makes clear that treaties are enforceable not only in purely private disputes, but equally in criminal cases and other cases to which the federal, state, or local government is a party.[13] In

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[13] *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (action to enjoin state official from enforcing regulation in violation of executive agreement); *Kolovrat*, 366 U.S. at 189, 198 (suit by state); *Clark*, 331 U.S. at 506-08 (suit by federal official); *Bacardi*, 311 U.S. at 161-63 (suit for injunction against territorial official); *Cook*, 288 U.S. at 121-22 (forfeiture

(footnote continued)

particular, treaties often limit the authority of the state and federal governments to prosecute crimes, and it has long been accepted that the individual charged with the crime is the appropriate party to raise the treaty limitation. For example, in *United States v. Rauscher*, 119 U.S. 407 (1886), the Court held that a criminal defendant extradited for one crime could invoke the protection of an extradition treaty that barred his prosecution for a different crime.[14] Indeed, courts in the United States have regularly applied the consular-immunity provisions of the Vienna Convention to decide consular

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proceeding by United States); *Nielsen*, 279 U.S. at 58 (proceeding between state tax collector and decedent's estate); *Jordan*, 278 U.S. at 125 (mandamus proceeding against state official); *Cheung Sum Shee*, 268 U.S. at 343, 345-46 (immigration case); *Asakura*, 265 U.S. at 340-42 (suit for injunction against municipality); *Johnson v. Browne*, 205 U.S. at 316, 320-22 (habeas corpus challenging federal criminal conviction); *Wildenhus's Case (Mali v. Keeper of Common Jail)*, 120 U.S. 1, 17 (1887) (habeas corpus by foreign consul against local jailer in state criminal matter); *Rauscher*, 119 U.S. at 418-19 (federal criminal case); *Chew Heong*, 112 U.S. at 538-39 (immigration case); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 536, 561-62 (1832) (state criminal case); *Soc'y for Propagation*, 21 U.S. (8 Wheat.) at 489 (civil suit by municipality); *Schooner Peggy*, 5 U.S. (1 Cranch) at 110 (prize case by United States); *see also United States v. Alvarez-Machain*, 504 U.S. 655, 659-61 (1992) (discussion of application of treaty in federal criminal case); *Ware*, 3 U.S. (3 Dall.) at 244 (opinion of Chase, J.) (discussion of application of treaty to state criminal cases).

[14] *See also, e.g., Alvarez-Machain*, 504 U.S. at 659-61 (discussing application of *Rauscher*); *Johnson*, 205 U.S. at 320-22 (affirming grant of habeas corpus where prisoner was tried and convicted in violation of extradition treaty with Canada); *Worcester*, 31 U.S. (6 Pet.) at 561-62 (reversing Georgia state conviction that violated treaty with Cherokee Nation); *Ware*, 3 U.S. (3 Dall.) at 244 (opinion of Chase, J.) (noting that state courts were obligated to dismiss criminal cases under peace treaty with Great Britain, citing *Respublica v. Gordon*, 1 Dall. 233, 233 (Pa. 1788) (dismissing treason prosecution because "any proceedings against ... the Defendant, would contravene an express article in the treaty of peace and amity, entered into, between the United States of America and Great Britain")).

officials' and employees' claims of immunity from criminal prosecution.[15]

II.
THE APPROPRIATE REMEDY FOR THE VIOLATION OF MR. SANCHEZ-LLAMAS'S VIENNA CONVENTION RIGHTS IS THE SUPPRESSION OF HIS WRONGFULLY OBTAINED STATEMENTS.

Oregon admits that it did not notify petitioner of his Article 36 rights. In the United States criminal justice system, the government is denied the use of evidence that it obtains in violation of a constitutional provision, statute, or rule of procedure that defines or safeguards a critical legal right. *United States v. Blue*, 384 U.S. 251, 255 (1966). Because the state has made no showing that Mr. Sanchez-Llamas was not prejudiced by the violation, all evidence obtained in violation of Petitioner's Article 36 rights should be suppressed.

A. The State May Not Use Evidence That It Obtains by Violating a Law That Creates or Safeguards Individual Rights.

1. United States Law Requires the Provision of a Judicial Remedy for a Violation of a Treaty Right Asserted in a Criminal Proceeding.

It is one of the most basic principles of American law that legal rights are not merely precatory. That is, where there is a legal right, there must be a legal remedy. As Chief Justice Marshall wrote in *Marbury v. Madison*:

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[15] *See Commonwealth v. Jerez*, 457 N.E.2d 1105, 1105 (Mass. 1983) (state criminal complaint against foreign consular officer dismissed on grounds of immunity under Vienna Convention Article 43); *see also Risk v. Halvorsen*, 936 F.2d 393, 397-98 (9th Cir. 1991) (civil suit against consular officials dismissed on grounds of immunity under Vienna Convention Article 43); *United States v. Cole*, 717 F. Supp. 309, 321-25 (E.D. Pa. 1989) (Vienna Convention controls claim of consular immunity from criminal prosecution); *State v. Doering-Sachs*, 652 So. 2d 420, 422-24 (Fla. Dist. Ct. App. 1995) (same); *Illinois Commerce Comm'n v. Salamie*, 369 N.E.2d 235, 238-42 (Ill. Ct. App. 1977) (same); *Silva v. Superior Court*, 125 Cal. Rptr. 78, 86-87 (Ct. App. 1975) (same).

> [The United States] has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

5 U.S. (1 Cranch) 137, 163 (1803).[16]

Treaties can and do apply to criminal proceedings.[17] Like the treaty provisions at issue in *Rauscher* and *Asakura*, discussed *supra* in Part I.D, Article 36 rights apply in the criminal law context, specifically to a foreign national who "is arrested or committed to prison or to custody pending trial or is detained in any other manner." Vienna Convention art. 36(1)(b). In other words, it attaches upon a foreign national's arrest, and it continues from the initial seizure through trial and subsequent incarceration.

The treaty rights conferred by the Vienna Convention are on full parity with rights flowing from a Congressional statute. *See, e.g., Head Money Cases*, 112 U.S. at 598-99 ("[A ratified treaty] is a law of the land as an act of Congress is,

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[16] *See also Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992) ("[It is] a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." (quoting 3 W. Blackstone, Commentaries 23 (1783))); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) ("Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, ... we can no longer permit that right to remain an empty promise."); THE FEDERALIST No. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation."). *See generally* Vazquez, *Treaty-Based Rights, supra*.

[17] *See supra* note 11 and accompanying text, and in particular, *Johnson*, 205 U.S. at 320-22 (affirming order to discharge prisoner held in violation of extradition treaty); *Rauscher*, 119 U.S. at 418-20 (dismissing indictment in violation of extradition treaty); *see also Valentine v. United States ex rel Neidecker*, 299 U.S. 5 (1936) (treaty with France did not authorize federal government to extradite native-born American citizens to France).

whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."). In effect, Article 36 functions in the United States in the same manner as a statute giving a detained foreign national the right to communicate with his or her consul, with specific direction to the states to give "full effect" to its provisions. *See Medellín v. Dretke*, 125 S. Ct. 2088, 2104 (2005) (O'Connor, J., dissenting) ("And if a statute were to provide, for example, that arresting authorities 'shall inform a detained person without delay of his right to counsel,' I question whether more would be required before a defendant could invoke that statute to complain in court if he had not been so informed."); *Li*, 206 F.3d at 71 (Torruella, C.J., dissenting in part) ("Were we dealing with such a text in a statute originally enacted by Congress rather than this species of 'Law of the Land,' is there any doubt as to how this provision would be interpreted?").

2. In the United States, Violations of Laws That Ensure the Basic Integrity of Criminal Proceedings Are Remedied Through the Exclusionary Rule.

This Court employs the exclusionary rule in the criminal law context "where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure." *United States v. Blue*, 384 U.S. at 255 (citations omitted). In addition to restoring and giving effect to the individual's rights, suppression has the remedial value of deterring authorities from future illegalities, as well as preserving the integrity of the judicial system by closing the courtroom doors to illegally seized evidence and to evidence with questionable reliability. *See Elkins v. United States*, 364 U.S. 206, 217, 222 (1960).

This Court has not limited the use of the exclusionary rule to constitutional violations, but has suppressed confessions in circumstances where the integrity of the criminal proceeding was jeopardized.[18] For example, in *Miller v. United States*, 357

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[18] Indeed, suppression of confessions has its roots in common law, not the Constitution. The exclusionary rule was first enunciated in *R. v. Warickshall*, 1 Leach 262, 168 Eng. Rep. 234, 235 (K.B. 1783), which held a coerced confession inadmissible in order to protect a defendant from an

(footnote continued)

U.S. 310, 313 (1958), police had probable cause to arrest defendant, but officers entered his residence in violation of the common law "knock and announce rule" codified in 18 U.S.C. § 3109.[19] The Court reasoned that by codifying the common law rule, Congress "has declared in § 3109 the reverence of law for the individual's right of privacy in his house." *Id.* (footnote omitted). Though the statute did not expressly provide for suppression, the Court ordered the exclusion of marked currency seized from the residence, observing that "tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." *Id.*

In the *McNabb-Mallory* line of cases, federal authorities obtained statements from custodial suspects who were not brought "without unnecessary delay" before an appropriate judicial officer. The delay violated, respectively, 18 U.S.C. § 595 and Rule 5(a) of the Federal Rules of Criminal Procedure. *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957). The Court noted that the "history of liberty has largely been the history of observance of procedural safeguards," *McNabb*, 318 U.S. at 347, and that the statutes were "part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement," *Mallory*, 354 U.S. at 453. The purpose of the "impressively pervasive requirement of

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erroneous conviction based upon an unreliable confession. *See, e.g., Dickerson v. United States*, 530 U.S. 428, 433 (2000) (quoting *Warickshall*); *see also, e.g., Bram v. United States*, 168 U.S. 532, 542 (1897); *Hopt v. Utah*, 110 U.S. 574, 585 (1884). In the United States, confessions were suppressed under common-law principles when the circumstances surrounding a confession indicated that the confession "was [not] in fact, voluntarily made." *Ziang Sung Wan v. United States*, 266 U.S. 1, 14-15 (1924) (finding confession involuntary). Over time, this Court embraced the notion that the "voluntariness" requirement was also embodied in the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment. *See Dickerson*, 530 U.S. at 433 (discussing history); *see also* Brief of NACDL as *Amicus Curiae* (same).

[19] The Court subsequently recognized the constitutional underpinnings of the "knock and announce" rule in *Wilson v. Arkansas*, 514 U.S. 927 (1995).

criminal procedure" was to "avoid all the evil implications of secret interrogation of persons accused of crime." *McNabb*, 318 U.S. at 343, 344.

As to the remedy, the *McNabb* Court noted that 18 U.S.C. § 595 expressed a "general legislative policy to which courts should not be heedless when appropriate situations call for its application." *McNabb*, 318 U.S. at 344. Although the statute did not contain an express suppression remedy, the Court explained that by excluding the confession evidence under its supervisory authority, it was both giving effect to the Congressional policy driving the statutory scheme and refusing to allow the courts to be complicit with the illegal conduct:

> Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law.

Id. at 345.

3. Under International Law, the Vienna Convention Requires a Judicial Remedy for Violations of Article 36 Rights to Consular Notification and Access.

Under Article 36(2), the United States has an international obligation to ensure that it affords Mr. Sanchez-Llamas a remedy sufficient to give "full effect" to his Article 36(1) rights. The *travaux préparatoires* of the Vienna Convention make clear that the parties to the Convention understood "full effect" to mean that each signatory nation is bound to implement and enforce the provisions in Article 36(1) within its criminal justice system. Indeed, an earlier version of Article 36(2) that was intended to ensure that Article 36 would not require a change in domestic criminal laws and procedures was rejected in favor of the stronger "full effect" formulation to ensure that Article 36 rights were in no way impaired by domestic law. *See* Conf. I, 12th plen. mtg., at 40, ¶¶ 3-4

(statement of the U.S.S.R.) ("The ['full effect' language] might force States to alter their criminal laws and regulations and allow consuls to interfere with normal legal procedure in order to protect alien offenders[.]"); *id.* at 40, ¶ 9 (rejecting U.S.S.R. proposal to change formulation); Conf. I, 2d Comm., 19th mtg., at 348, ¶¶ 10, 13 (adopting "full effect" formulation).

The ICJ has similarly concluded that Article 36 has application to, and is to be given full effect in, the domestic criminal law context. In *Avena*, the ICJ held that in the event of a Vienna Convention breach, the United States was required to "provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention." *Avena* ¶ 153(11); *see also LaGrand* ¶ 128(7) (finding that should nationals of the Federal Republic of Germany be sentenced to severe penalties without the benefit of the Article 36 rights, the United States "shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention"). In so doing, the ICJ relied on the established principle that reparation for an illegal act "must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." *Avena* ¶ 119 (quoting *Factory at Chorzów*, 1928 P.C.I.J. (ser. A) no. 17, at 47 (decision on merits)). As the United States itself explained in the *Tehran Hostages* case,

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the [Vienna] Convention itself.

Memorial of the United States, *Tehran Hostages, supra*, 1980 I.C.J. Pleadings at 188 (quoting *Factory at Chorzów*, 1927 P.C.I.J. (ser. A) no. 9, at 21 (decision on jurisdiction)). Applying this long-established principle, the ICJ held that the Vienna Convention required the United States to provide a judicial remedy for violations of individuals' rights of consular access

and notification. *Avena* ¶¶ 121-22, 127, 140-41.[20] In other words, failure to provide a judicial remedy that attaches legal significance to the fact of an Article 36(1) violation would violate the treaty.

B. Article 36 Supplies a Right for Which Suppression Is the Appropriate Remedy.

In accordance with *Miller* and the *McNabb-Mallory* line of cases, suppression is the appropriate remedy for an Article 36 violation. *First*, suppression of an illegally obtained confession is necessary to restore to an arrested foreign national the rights that were taken from him in violation of Article 36. *Second*, suppression is necessary to put an end to the egregious and persistent pattern of disregard of Article 36 that state and local authorities in this country have demonstrated over the past four decades. *Finally*, suppression is necessary to ensure that Article 36 serves its function of protecting detained foreign nationals' substantive rights.

1. Suppression Is Appropriate Because the Failure to Inform an Arrested Foreign National of His Rights Eliminates the Benefits of Early Consular Assistance Contemplated by Article 36.

Suppression as a remedy is necessary to make petitioner's Article 36 rights effective. Whether the police refuse to allow a detained foreign national to contact his consulate on request, or fail to inform him of his right to contact his consulate, they violate the express requirements of Article 36. The foreign national suffers an injury to his legal rights whether government authorities refuse to perform a legal duty or fail to perform a legal duty. In both instances, the authorities deny the foreign national the intended benefits of Article 36.

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[20] The ICJ left to United States courts to determine whether the application of the exclusionary rule is required in certain cases involving violations of the Vienna Convention. It found that the exclusionary rule "relates to the question of what legal consequences flow" from the breach of Article 36 obligations, and that the United States courts should examine the appropriateness of suppression "under the concrete circumstances of each case" in "the process of their review and reconsideration." *Id.* ¶ 127.

Article 36 reflects the determination of the nations represented at the Vienna conference—ratified by the President and Senate of the United States—that, as a class, arrested foreign nationals are subject to particular disadvantages and are to be afforded rights above and beyond the rights held by citizens. It is not unusual for a treaty to provide to an alien legal protections that are unavailable to a citizen: "[T]reaties, in safeguarding important rights in the interest of reciprocal beneficial relations, may by their express terms afford a measure of protection to aliens which citizens of one or both of the parties may not be able to demand against their own government...." *Todok v. Union State Bank*, 281 U.S. 449, 454-55 (1930).

By not providing petitioner with the legally required notice of his Article 36 rights, the police gave petitioner a misleadingly incomplete picture of his legal options, in effect misrepresenting to him the legal rights that were available to him. Police may, to a point, misrepresent *facts* to induce a confession. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (police falsely tell defendant that companion had confessed). Police may not, however, misrepresent the *law* to induce a confession. *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (confession involuntary where police told defendant that she would be deprived of state financial aid if she refused to cooperate with authorities); *see also Miranda v. Arizona*, 384 U.S. 436, 476 (1966) (police may not threaten, trick, or cajole a suspect into a waiver of rights).[21]

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[21] *Moran v. Burbine*, 475 U.S. 412 (1986), illustrates the point. In *Moran*, police arrested the defendant for burglary and suspected him in an unrelated murder. The defendant's sister contacted a public defender, who called the police station and was informed that the defendant would not be questioned until the following day. *Id.* at 416-17. However, the police questioned defendant that night and obtained incriminating statements related to the murder. *Id.* at 417. The Court held that the misinformation to the *attorney* did not affect *defendant's* exercise of choice; further, the failure to tell the defendant about *external facts* (that an attorney inquired about him) did not affect the questions that govern the validity of defendant's waiver (*i.e.*, did defendant know the rights, did he understand the consequences of waiver, and did he waive the rights voluntarily). *Id.* at 422-23. Again, police informed the defendant of

(footnote continued)

The police misconduct in this case effected both a misrepresentation of, and a reduction in, the legal options that, by law, must be made available to individuals in petitioner's position. The failure to inform the petitioner of *all* his rights denied him the benefits of his right to seek consular assistance.

One of the most important functions of a consul is to serve as "a cultural bridge for detained nationals who must otherwise navigate through an unfamiliar and often hostile legal system." *United States v. Chapparro-Alcantara*, 226 F.3d 616, 622 (7th Cir. 2000) (citation omitted). As the State Department has emphasized in regard to U.S. nationals detained abroad, "[f]ew of our citizens need [consular] assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail." 7 FAM, *supra*, § 412. Arrested foreign nationals in the United States are often isolated from family and friends, speak English only as a second language or not at all, and fail to understand their rights under the U.S. criminal justice system. They may also suffer from unwarranted fears about the consequences of asserting their legal rights. LUKE T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991).

Indeed, Article 5 of the Vienna Convention defines consular functions to include "protecting in the receiving State the interests of the sending State and of its nationals," "helping and assisting nationals ... of the sending State," and "representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining ... provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests." Vienna Convention art. 5(a), (e), (i). The *travaux* confirm that "safeguarding the interests of the sending State and its nationals is the most important of the many consular functions," Conf. II, at 7, ¶ 7, that the consulate's power to

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all his rights in *Moran*, *id.* at 420-21, while the police did not inform the petitioner of all his rights in the present case.

represent or arrange representation for a national applies when the individual is "detained or imprisoned," *id.* at 8, ¶ 17, and that this right "is absolutely essential to the exercise of consular functions which consist ... of protecting the interests of the sending State and of its nationals," *id.* at 8, ¶ 16. The state's failure to notify petitioner of his right to contact his consulate deprived him of the opportunity to seek any of the assistance that the consulate could have provided him under Article 5. Allowing his illegally obtained confession to be admitted would fail to give "full effect" to his rights of consular notification and access as required by Article 36(2).

2. Suppression Also Creates an Incentive for State and Local Authorities to Comply with Their Obligations Under Article 36.

Despite initial State Department assurances to Congress that every State is periodically notified of its duties under existing treaties, the 36-year history of Article 36 in this country has been a virtually unbroken pattern of noncompliance and nonenforcement by state and local authorities. "In this country, the individual States' (often confessed) noncompliance with the treaty has been a vexing problem." *Medellín,* 125 S. Ct. at 2096 (O'Connor, J., dissenting). As occurred under the Articles of Confederation, the States' noncompliance with Article 36 causes international disagreement and litigation between the United States and other signatory nations that expect and demand the United States to fulfill its obligations under the treaty. *See, e.g., Avena; LaGrand.*

The decades-old noncompliance by authorities in the United States with the "pervasive" procedural requirement of Article 36 has, to date, successfully "stultif[ied] the policy" underlying the law. *McNabb,* 318 U.S. at 343, 345. Despite the battles fought at the conference to ensure enforcement of Article 36 in each signatory nation's criminal justice system, the law has proved feeble domestically. Denying the prosecution the fruits of its illegal conduct restores the individual's rights, honors the policy choice made in the treaty, makes the executive accountable for its actions, preserves judicial integrity, promotes the rule of law, and, in

this instance, is necessary to satisfy the nation's international obligations.

3. Suppression Also Ensures that Article 36 Is Effective in Safeguarding the Underlying Rights It Protects.

Like any procedural protection, Article 36's requirement of consular notification and access serves a substantive goal. Though not a constitutional right itself, Article 36 functions to protect a foreign national's ability to exercise his constitutional rights effectively. Just as the procedural "knock and announce" statute in *Miller* safeguarded Fourth Amendment interests, and the statute and procedural rule at issue in *McNabb* and *Mallory*, respectively, served as procedural safeguards for the values underlying the Fifth Amendment right against self-incrimination, the rights and procedures in Article 36 both supplement and procedurally safeguard a foreign national's privilege against self-incrimination, among other rights.

The *Miranda* reasoning starts from the premise that a stationhouse custodial interrogation is inherently coercive, in large part because of the suspect's isolation from family and familiar surroundings. *Miranda*, 384 U.S. at 449 ("The officers are told ... that the 'principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation'" (quoting INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS 1 (1962)). Accordingly, *Miranda* required that specific warnings be given to protect against coerced, and possibly unreliable confessions.

The Article 36 notification requirements provide an additional protection for detained foreign nationals, a protection that is particularly crucial for those who are unfamiliar with the United States legal system. The Vienna conference delegates recognized that detained foreign nationals were exceptionally vulnerable and disadvantaged and were, therefore, to receive a specially crafted right of communication that was tailored to meet their needs in those particular circumstances. Therefore, the treaty safeguarded the right to communicate with the consul through a specially crafted rule of procedure—notification of the foreign national of his rights to consular communication. Conf. I, 20th plen.

mtg., at 82, ¶ 59 (comments of French delegate) ("It would be inconceivable for the Conference to adopt a convention on consular relations which did not contain an article on the essential matter of the protection of nationals of the sending State and *in particular the protection of those who needed it most because they were in prison, custody or detention.*") (emphasis supplied).

Unlike other local participants in a state's criminal system, consular officers located in the detaining state are uniquely situated to translate the often complex and unfamiliar legal concepts into terms the foreign national can readily understand. Indeed, the U.S. State Department explains, in its instructions to U.S. consuls overseas, that "[a]rrested U.S. citizens or nationals often have an imperfect understanding of American criminal procedure and less or no understanding of the legal procedures of the country in which they are detained," and that a critical function of U.S. consuls abroad is to provide information to detained foreign nationals about their rights under the local legal system. 7 FAM, *supra*, § 415.3.

Contrary to what some courts have suggested, *Miranda* warnings are not an effective substitute for the notification of Article 36 rights. *First*, the operating premise of Article 36 is that, because of the inherent disadvantages that flow from being an alien in a foreign legal system, a foreign national is, as a rule, deserving of special assistance. The right to consular communication is *in addition to* the rights already provided to a citizen; in other words, Article 36 *supplements* whatever rights and protections already provided to detained citizens.[22]

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[22] In effect, this case is the inverse of *Dickerson*, 530 U.S. 428. Following the *Miranda* decision, Congress enacted 18 U.S.C. § 3501, which sought to restore the due process "voluntariness" test, *in lieu* of the *Miranda* warnings, as the sole basis for determining the admission of self-incriminating statements obtained during custodial interrogation. The Court held the statute unconstitutional, on the rationale that the *Miranda* decision was constitutionally based and Congress could not legislatively "supersede" the Court's interpretation of a constitutional provision. *Id.* at 437. While *Dickerson* involved a Congressional attempt to effectively *decrease* the procedures for safeguarding the Fifth Amendment privilege in the custodial setting, the present case concerns a treaty provision that *increases* the substantive and procedural

(footnote continued)

Again, the conference identified detained foreign nationals as a class deserving of special protection because of its particular vulnerability, and the President and Senate ratified this decision—a clear and valid policy choice that the judiciary should honor.

Second, the reasoning ignores the dynamics of a custodial setting and the operating premises of the policy makers who drafted and adopted Article 36. Just as the *Miranda* Court noted the psychologically coercive aspect of removing a suspect from familiar settings to the stationhouse, the conference delegates noted the particular pressures on a detained foreign national and fashioned a discrete notification mechanism designed to redress the particular coercive aspect unique to their situation—namely, the foreignness of the isolation. A consular officer's ability to enlighten the foreign national about the totality of the circumstances, render multiple forms of assistance, and bridge the cultural gap between the foreign national and the local authorities is precisely the kind of remedial assistance that the conference intended to be made available to the detained foreign national.

The policy choices that Article 36 represents are legitimate and commonsensical. For instance, it is fair to assume that an American college student arrested for a serious crime in Turkmenistan would more readily ask to speak with an American consulate official than with a lawyer promised by the detaining local authorities.

The conference recognized that a foreign national would uniquely benefit from contact with an official who both shared the national's language and culture and had working knowledge and familiarity with the local culture and legal system. As the Government of Canada has observed,

> [The typical] detained foreign national who is not relatively sophisticated, or who lacks strong

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protections for an identified class—a development that the *Miranda* Court anticipated: "We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." *Miranda,* 384 U.S. at 467.

> connections in the arresting community, is especially vulnerable to making dangerously uninformed choices in exercising even the rights of which the arresting authorities do inform him.... [W]ith no one to explain his predicament in the context of the more familiar system of his home country, a detained foreign national is at a considerable disadvantage in establishing a defense.

Amicus Brief of Canada at 10, *Ex Parte Faulder* (Tex. Crim. App. 1997) (No. 10,748-AA).

C. The State Has Not Met Its Burden of Proving the Admissibility of the Illegally Obtained Confession.

Unlike a *habeas* proceeding, the government as plaintiff bears the burden of persuasion in a criminal prosecution. *In re Winship*, 397 U.S. 358, 362-64 (1970). The prosecution has the burden of establishing the admissibility of a criminal defendant's out-of-court statements. *See Lego v. Twomey*, 404 U.S. 477, 489 (1972) (the prosecution must prove by a preponderance of the evidence that a confession was voluntary); *Colorado v. Connolly*, 479 U.S. 157, 187 (1986) (the prosecution must prove by a preponderance of evidence that defendant voluntarily waived the *Miranda* rights).

Just as the prosecution in *Miller* had to establish the admissibility of the evidence that was challenged under the statutory "knock and announce" rule, and the prosecution in the *McNabb-Mallory* line of cases had to establish the admissibility of the confessions in view of the prompt appearance statute and rule at issue in those cases, the prosecution in this case likewise had the burden of establishing the admissibility of petitioner's statements following the Article 36 violation. That is, the prosecution had to establish that interfering with petitioner's right to communicate with the consulate and to receive the multiple benefits of consular assistance did not taint petitioner's subsequent decisions to continue with the interrogations and give self-incriminating statements.

The state admitted violating Article 36 but produced no evidence to show that the violation did not prejudice petitioner. Article 36 creates the substantive right of an arrested foreign national to have the assistance of his

consulate, and it prescribes procedures for the detaining authorities to facilitate the foreign national's exercise of that right. The state did not attempt to show that, if petitioner had known of his right to contact the consulate, the consular officials would not have acted to "protect[] ... the interests of" petitioner, Vienna Convention art. 5(a), or "help[] and assist[]" him in understanding the criminal process, *id.* art. 5(e), including by "representing or arranging appropriate representation" for him, *id.* art. 5(i). Because the state has not met its burden, the confession should have been suppressed.

In this case, the evidence was uncontested that Oregon authorities failed to provide Mr. Sanchez-Llamas with notification of his Article 36 rights despite the fact that authorities established in the very first hour of arrest that petitioner was a Mexican foreign national with a wife and three children living in Mexico. (Tr. 124.) At the time of his eleven-hour interrogation, petitioner was operating under multiple impediments that could have been cured with consular assistance. He spoke very little English and was an undocumented foreign national who expressed clear confusion over his legal rights in the United States criminal justice system. He was not only physically incapacitated as a result of the beating he had received from the arresting officers, his lack of sleep and his consumption of alcohol, but he was culturally and linguistically impaired. Most significantly, petitioner had no context to understand the officers' rendition of Miranda rights, particularly the implications of making statements to the police under United States law which differ in substantive respects from Mexican criminal law. *See* Brief of Mexico as *Amicus Curiae*. The record is also replete with evidence that petitioner had no understanding of his right to stop talking to the police. Petitioner suffered from a culturally-rooted misconception about police officers using beatings in order to extract confessions. Indeed, after being beaten during his arrest by the officers who served as his interrogators, he made statements in the course of his confession that were affirmatively proven untrue at trial.

Nor can the state seriously argue that the admission of petitioner's statement had no effect on the jury's verdict. The

jury's primary task was to determine defendant's mental state when he shot at police. Was petitioner shooting reflexively or in self-defense? Was he a confused drunk recklessly shooting at a light that startled him? Or did he know that police were shining the lights on him, and was he trying to kill or seriously injure them? The state relied on petitioner's confession to prove *mens rea*. Under the circumstances, the state cannot possibly meet its burden of showing that the error caused no prejudice.

CONCLUSION

For these reasons, petitioner respectfully requests that the Court reverse the judgment of the Supreme Court of Oregon, set aside petitioner's conviction and sentence, order petitioner's confession suppressed, and remand the case for a new trial.

Respectfully submitted,

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In the Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

Petition for Writ of Certiorari to the Oregon Supreme Court

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QUESTIONS PRESENTED

1. Does Article 36 of the Vienna Convention on Consular Relations confer on a foreign national detained in the United States individual rights of consular notification and access enforceable in the courts of the United States by that national?

2. Does the failure to advise a foreign national detained in the United States of his rights under the Vienna Convention result in the suppression of his statements to police?

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STATEMENT OF THE CASE

1. On Saturday, December 18, 1999, petitioner, a Mexican national, shot at police and wounded one officer. *State v. Sanchez-Llamas*, 338 Or. 267, 269, 108 P.3d 573 (2005), Pet. App. 15. After his arrest, the police read petitioner *Miranda* warnings in both English and Spanish. *Id.* Petitioner made a number of incriminating statements during the initial interrogation, which occurred between 4:15 a.m. and 2:30 p.m.. *Id.*, 338 Or. at 270, Pet. App. 16; (1 Tr. 155-56). Law-enforcement officers did not inform petitioner that he could communicate with the Mexican consulate and did not inform the consulate of his arrest.

Petitioner moved to suppress the post-arrest statements on two grounds: (1) his *Miranda* waiver and statements were not voluntary, and (2) the police failed to comply with Article 36 of the Vienna Convention on Consular Relations (Vienna Convention), S. Exec. Rep. No. 9, 91st Cong., 1st Sess. (1969). The trial court denied petitioner's motion. The trial court found "by clear and convincing evidence that [petitioner] understood his *Miranda* rights and knowingly, intelligently and voluntarily waived his right to remain silent and to have an attorney present during questioning."[1] Moreover, the trial court found "by clear and convincing evidence, given the totality of the circumstances, that [petitioner's] statement was voluntary." Finally, the trial court ruled that "any violation of the Vienna Convention that may have occurred * * * [did] not require suppression of [petitioner's] statements." *Sanchez-Llamas*, 338 Or. at 270, Pet. App. 16 (quoting trial court ruling).

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[1] The trial court's ruling is found in the excerpt of record accompanying petitioner's brief in the Oregon Supreme Court at E.R. 33-34.

2. After a jury trial, petitioner was convicted of 11 felony counts, including attempted murder and attempted aggravated murder, and sentenced to 246 months in prison. *Id.* Petitioner appealed the denial of his motion to suppress and the Oregon Court of Appeals affirmed without a written opinion. *State v. Sanchez-Llamas*, 191 Or. App. 399, 84 P.3d 1133 (2004). In the trial court and the Oregon Court of Appeals, petitioner's argument that his statements should be suppressed as involuntary rested principally on five grounds: the force used to arrest him, his language and cultural differences, his intoxication, his low intelligence, and his confinement during the questioning. The appellate courts presumed that the trial court decided the facts consistently with its ultimate conclusion. *State v. Ehly*, 317 Or. 66, 74-75, 854 P.2d 421 (1993); *see also Ball v. Gladden*, 250 Or. 485, 487, 443 P.2d 621 (1968) ("If findings are not made on all such facts, and there is evidence from which such facts could be decided more than one way, we will presume that the facts were decided in a manner consistent with the ultimate conclusion, e.g., voluntariness or lack thereof, made by the trial court or jury.").

There was conflicting testimony about the amount of force used to effectuate petitioner's arrest. One witness, viewing the incident from 30 feet away, through a closed window, in the middle of the night, just after waking up, claimed that the arresting officers hit petitioner with the butt of a gun and slammed him against a nearby van. (1 Tr. 91, 93-97). Officer Whipple, however, testified that he did not see anybody slam petitioner into a van, 1 Tr. 114-115, and did not see anyone hit petitioner with the butt of a gun. 1 Tr. 108. The paramedic who initially examined petitioner testified that petitioner had suffered only very minor injuries. 1 Tr. 78. The doctor who examined petitioner at the hospital also did not notice any serious injuries and authorized petitioner's release back to the police officers. 1 Tr. 171-72. Petitioner himself stated that he

did not want to go to the hospital. 1 Tr. 77. The lack of injuries is inconsistent with petitioner's claim that he was beaten while being arrested and that he was physically incapacitated as a result. *See* Pet. Br. 3, 4, 49.

Similarly, the evidence on whether petitioner was "culturally and linguistically impaired" was contested. At the time he committed the crimes, petitioner had lived in the United States for 11 years, working at several different jobs. 1 Tr. 124, 143, 177. Petitioner understood many of the questions and commands that were communicated to him in English during and immediately following the crime. 1 Tr. 47, 69, 76, 79, 104-05, 108, 130, 136. The officer who served as the interpreter and who was with petitioner all day during the interviews spoke the same dialect of Spanish as petitioner. 1 Tr. 183-84. Officers repeatedly read petitioner his *Miranda* rights, in both English and Spanish. 1 Tr. 108, 123, 129, 176. Petitioner admitted that he understood those rights, as the trial court concluded and the appellate courts accepted. Although petitioner offered evidence about his cultural beliefs concerning police, there was no evidence to support his claim that his ability to make voluntary statements to the police was impaired by his cultural differences.

Nor was petitioner's intoxication so great as to render his statements to the police involuntary. The day before petitioner shot the police officer, he consumed a 12-pack of beer, spread out over most of the day. 1 Tr. 144. Officers who interviewed petitioner noticed signs of intoxication, but testified that petitioner "appeared coherent" and "wasn't intoxicated to the point where he couldn't understand what was going on." 1 Tr. 125; 175-76. Petitioner repeatedly told investigators that he was not drunk. 1 Tr. 145-46. A nurse who examined petitioner also noticed the smell of alcohol, but testified that petitioner was "not out of it." 1 Tr. 164-65. The evidence estab-

lished that petitioner was not so intoxicated that it affected his rational decision-making process.

Nor was there anything about petitioner's confinement during the interrogation that impaired petitioner's ability to make a free and unconstrained choice to speak with officers. After the shooting and arrest, petitioner was interviewed a number of times in the officers' offices and later at the hospital. 1 Tr. 129. Petitioner had several breaks during the interview process, including a break for lunch and for his examination at the hospital. 1 Tr. 126, 129, 138-39. Petitioner remained in handcuffs during the interviews, but early during the process, police adjusted his handcuffs to the front of his body. 1 Tr. 156-57.

The most important misstatement petitioner makes about the record is his assertion that the officers who initially interviewed him "quickly established that petitioner was a Mexican national who spoke little English." Pet. Br. 3-4. Although the State has never argued that it fully complied with the Vienna Convention, it has never been determined precisely when the breach occurred. However, petitioner's suggestion that it occurred at the outset of the interrogation is not supported by the record. The transcript pages petitioner cites for his statement that competent authorities "quickly established" his foreign nationality do not support the assertion.[2] Pet. Br. 4.

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[2] At page 76, a paramedic who evaluated petitioner testified that she did not speak Spanish and that petitioner "understood some of the things that we were saying" and "he seemed to understand what I was asking him." At page 108, Officer Whipple described transporting petitioner to the jail and testified that petitioner responded to commands made in English and the officer advised petitioner of his *Miranda* rights en route in English. At page 118, Detective Ford testified that he does not speak Spanish; he waited a few minutes

Nothing in the transcript establishes that the law-enforcement officers knew that petitioner was a foreign national; at most they show that the officers knew that petitioner spoke Spanish as well as some English. Detective Ford testified that he knew during the initial interview that petitioner had lived in the United States for 11 years, visited Mexico several times in the prior three years, and had a wife and children in Mexico. 1 Tr. 124, 143-44. The record does not establish that the detective ever asked petitioner if he was a foreign national, and petitioner did not volunteer that information. The trial court made no findings about when the officers knew that petitioner was a foreign national or when the officers would have been obligated to inform petitioner that they could contact the consulate on his behalf.

3. The Oregon Supreme Court addressed only one issue—whether the State's violation of the Vienna Convention required suppression of petitioner's post-arrest statements—and concluded that the Vienna Convention "does not create rights that individual foreign nationals may assert in a criminal proceeding." *Sanchez-Llamas*, 338 Or. at 269, Pet. App. 15. The court began by noting "the general rule, widely recognized in the federal courts, [] that rights created by international treaties belong to the signatory state and are *not* en-

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after petitioner's arrival at the station for a Spanish-speaking officer to arrive. At pages 122-123, Detective Ford testified that petitioner was given *Miranda* warnings in English and Spanish; that petitioner understood and asked for clarification on one part and again indicated that he understood it. At page 136, Detective Ford testified that petitioner responded to the English questions and did not wait for them to be interpreted into Spanish before responding. At page 175, the officer serving as an interpreter explained that he was asked to assist with translations.

forceable in American courts by private individuals." *Id.* at 272, Pet. App. 18 (emphasis in original). The court acknowledged that the presumption against the creation of individual, judicially enforceable rights may be overcome "by explicit wording and even by provisions that necessarily imply a private right of judicial enforcement." *Id.* at 274, Pet. App. 20. Nevertheless, the court found nothing in Article 36 of the Vienna Convention to suggest that the treaty refers to a detainee's "rights" as anything other than a convenient way of describing the obligation of the signatory state. *Id.* at 275, Pet. App. 21. Instead, the wording and purposes of the treaty "suggest that the treaty and Article 36 are concerned with relationships and obligations among *nations*, not with individual rights." *Id.* (emphasis in original; footnote omitted).

Finally, the court concluded that the State Department's interpretation of the Vienna Convention was consistent with the court's reasoning, *id.* at 276, Pet. App. 22, and noted the unequivocal agreement of the state and federal courts that have addressed the issue. *Id.* at 277 n. 10, Pet. App. 23. The court concluded "that Article 36 of the [Vienna Convention] does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding" and affirmed petitioner's conviction and sentence. *Id.* at 276-77, Pet. App. 22-23.

4. Petitioner sought a writ of certiorari on both the voluntariness and the Vienna Convention issues. In granting certiorari, this Court limited the case to the Vienna Convention issues.

Summary of Argument

Petitioner asks this Court to require suppression of lawfully obtained statements in a state criminal proceeding as a remedy for a violation of Article 36 of the Vienna Convention. Article 36 does not create a right that a foreign national

like petitioner can enforce against the receiving state. Nothing in the text or context of the treaty supports recognition of a right that petitioner can enforce in a domestic criminal proceeding. The negotiation and ratification history confirm that the signatories to the treaty did not intend to create an individually enforceable right. The treaty and its history establish that it was intended to create obligations for the signatories that would further their ability to establish and maintain consular relations with one another. The fact that individuals may benefit from these obligations is insufficient to establish a right that the individual can enforce against one of the signatories. The Oregon Supreme Court's construction of Article 36 is consistent with the interpretation of the treaty by the Executive Branch. It also is largely consistent with the interpretation of Article 36 by the International Court of Justice.

Even if this Court adopts petitioner's proposed construction of Article 36 and finds a right that a foreign national can enforce in a domestic criminal proceeding, this Court should nevertheless reject petitioner's claim that suppression of lawfully obtained evidence is the remedy for a violation of that right. Nothing in the record ties the State's failure to inform petitioner as required by Article 36 to petitioner's voluntary statements made within the first 12 hours of petitioner's arrest. Even if the statements were made after the State's violation of Article 36, suppression of those statements would not be a remedy. This Court has invoked suppression in state courts as a remedy for constitutional violations, but petitioner concedes that any right created by Article 36 is not a constitutional right. This Court also has invoked suppression as a remedy for a violation of a statutory right, but only through the Court's supervisory authority over the federal courts. As this Court has recognized, it lacks the ability to impose suppression of evidence on state criminal courts for violations of federal statutory rights. Because any treaty right is the equiva-

lent of a federal statutory right, this limitation should apply here. Even if the Court could require suppression, it should reject petitioner's assertion that suppression is necessary as the only remedy that will satisfactorily address a violation of Article 36.

Should the Court disagree and require suppression of evidence for violations of Article 36, it should place a burden on the foreign national to come forward with evidence connecting the violation to some harm before the suppression remedy can be invoked. Petitioner failed to meet that burden in this case.

ARGUMENT

The Vienna Convention, a 79-article agreement between 168 signatory nations, was designed to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems" and "to ensure the efficient performance of functions by consular posts on behalf of their respective States." Preamble; App-1.[3] It imposes an obligation on "the competent authorities of the receiving State" to inform a detained foreign national that, if that individual requests, the authorities will notify "the consular post of the sending State" about the individual's detention and will forward communications from the individual to the consular post. Article 36(1)(b). Petitioner invites this Court to establish a court-ordered suppression remedy in domestic criminal prosecutions when competent authorities fail to provide the information required by Article 36(1)(b). Neither the Vienna Convention nor any other legal authority supports the creation of that remedy.

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[3] The preamble, Article 5, and Article 36 of the Vienna Convention are set out in the Appendix to this brief. App. 1-4.

I. The Vienna Convention is self-executing.

Petitioner asserts, and the State agrees, that the Vienna Convention is self-executing "in the sense of being implemented directly in the United States rather than through separate legislation." Pet. Br. 12. Similarly, the State agrees that the treaty has the domestic force of a federal statute. *Id.* The authority to establish binding obligations pursuant to a treaty rests with the President and the Senate. U.S. Const. Article II, § 2.[4] Once in force, the treaty is the equivalent of federal statutory law, pursuant to the Supremacy Clause. U.S. Const., Art. VI, cl. 2.[5]

Nor does the State dispute that *certain* treaties may be invoked by an "affected foreign national" in disputes between private parties or where the federal, state, or local government is a party. Pet. Br. 30; 33. But it depends upon the treaty. Treaties may "contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country." *Head Money Cases*, 112 U.S. 580, 598 (1884). Some treaties may be invoked by aliens in our courts as shields against local or

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[4] "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[.]"

[5] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

state governmental actions that breach the terms of those treaties. *See, e.g., Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (where treaty expressly details the liberties secured for citizens or subjects of the signatories, those individuals may judicially enforce the treaty in the courts of the signatory); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928) (involving same treaty). But these propositions of law merely invite close examination of the question that *is* disputed, namely, whether Article 36 of the Vienna Convention confers the rights claimed by petitioner and supports the remedy petitioner seeks.[6] Respondent and petitioner disagree, not about the self-executing nature of the treaty, but about what rights and obligations the treaty creates and about how those rights and obligations may be enforced.

II. The Vienna Convention does not create individual rights enforceable by a foreign national in a domestic criminal proceeding.

Contrary to petitioner's assertion, interpretation of the treaty is not to be determined by applying international-law principles. Pet. Br. 14. Instead, the proper construction of the

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[6] Similarly, the cases petitioner cites in footnotes 11 and 13, Pet. Br. 30, 33, do not support any proposition other than the unremarkable one that the intended meaning of the treaty at issue in a case controls the outcome. In each case, after determining the meaning of the treaty, this Court found that the domestic law, regulation or action challenged yielded to the treaty. *See, e.g., United States v. Rauscher*, 119 U.S. 407, 422-23 (1886) (treaty permitting extradition for specified crimes did not permit subsequent prosecution for different crimes); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 239-42 (1796) (dissecting the 4th article of the Treaty of Peace with Great Britain; reviving pre-treaty debts seemingly extinguished by Virginia law).

treaty is a question of federal law, often treated as similar to a question of statutory construction. *See Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 222-223 (1996) (although the Court's goal is to determine the shared expectations of the contracting parties, the Court determines for itself the meaning of the treaty). The starting point is with the language that the Court must construe and the context in which that language is used. *Air France v. Saks*, 470 U.S. 392, 396-97 (1985). The Court strives "to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Id.* (citations omitted).

Before turning to analysis of the text, it is important to clarify what "right" petitioner seeks to find in the Vienna Convention. Petitioner asserts that Article 36 of the Vienna Convention confers "a judicially enforceable individual right to consular notification and access." Pet. Br. 11. Petitioner later appears to recognize that a more limited "right" is at issue in this case, noting that the issue is not an individual's right to consular notification and access, but "[t]he requirement that a detained foreign national be informed of his or her right to contact the consulate[.]" Pet. Br. 21; *see also* Pet. Br. 10-11 (summarizing argument as focused on the "failure of the police to abide by their obligation, under Article 36, to inform the petitioner of his right to seek consular assistance"); Pet. Br. 42 (referring to violation as "not providing petitioner with the legally required notice of his Article 36 rights"); Pet. Br. 43, 45, 49 (failure again described as not informing petitioner of his rights).

To the extent petitioner attempts to broaden this claim to include interference with a right of access to his consulate, only the narrower focus is properly before this Court because the State never interfered with petitioner's access to his con-

sulate.[7] The only obligation the State violated was the requirement that competent authorities inform petitioner at some point in his detention that they could notify the consulate about his detention. The questions in the case narrow to whether the Vienna Convention grants petitioner an individually enforceable right to have the State provide that information and, if so, whether suppression of lawfully obtained evidence is a remedy for the violation of that limited right.[8] As will be shown, there is no basis for finding either that right or that remedy in the Vienna Convention or elsewhere.

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[7] Nor did the State interfere in any way with the consul's ability to carry out the duties and functions recognized in the Vienna Convention. It is important to note, as well, that petitioner never asserts that the "rights" at issue in this case include a right to specific consular assistance. Nor could he. Nothing in the treaty obligates a consul to respond when notified or to provide assistance to a detained foreign national. Thus, where petitioner bases his argument on steps the consul *may* take on behalf of a foreign national, *see* Pet. Br. 41-48, his assertion is irrelevant because it is based on a "right" that even petitioner does not argue is found in the treaty.

[8] Because petitioner seeks suppression of statements he voluntarily made to law-enforcement officers after a valid waiver of his *Miranda* rights, a third question arises. Petitioner asserts that suppression is the necessary remedy for his "illegally obtained confession." Pet. Br. 44. But petitioner never establishes a link between the treaty violation and the statements he wants to suppress. For suppression to be a remedy for "illegally obtained" evidence, petitioner also must establish that the treaty requires the information about consular contact to be provided prior to any law-enforcement interrogation.

A. Neither the text nor context of the Vienna Convention establishes a right to information that is enforceable by a foreign national in a domestic criminal proceeding.

Analysis of a treaty's meaning begins with the text of the treaty and the context in which the written words are used. *Volkswagenwerk v. Schlunk*, 486 U.S. 694, 699 (1988). A treaty's plain language controls absent "extraordinarily strong contrary evidence." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). If, as here, the right petitioner seeks is not expressly found in the text of the treaty, the question then becomes "whether the Treaty should be interpreted so as to include an implied term" providing the right and the remedy sought to be invoked. *See United States v. Alvarez-Machain*, 504 U.S. 655, 666 (1992) (where the treaty does not expressly include the right the party asserts, the Court will look at "whether the [right] had been so clearly recognized that the grant should be implied") (quoting *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 17 (1936)).

The presumption is against finding an individually enforceable right implied in the treaty, as the Oregon Supreme Court correctly noted. Treaties generally are viewed as agreements between the signatories that depend for their enforcement on the political and diplomatic efforts of the signatories, not the judiciary. As this Court stated in *Head Money Cases*, 112 U.S. at 598,[9]

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[9] Petitioner takes the Oregon Supreme Court to task for its reliance on this case and its characterization of "a presumption *against* the creation of individual, judicially enforceable rights[.]" *Sanchez-Llamas*, 338 Or. at 273; Pet. App. 20. *See* Pet. Br. 32-33. The Oregon Supreme Court is not alone in reading the case to stand for the proposition that treaties that create rights are the exception. *See, e.g., United States v.*

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provision on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

See also Charlton v. Kelly, 229 U.S. 447, 474 (1913) (stating same proposition); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829) ("The judiciary is not that department of the government, to which the assertion of its interest against foreign powers is confided.").

To be sure, treaties *can* create rights that are judicially enforceable by an individual. *See Head Money Cases*, 112 U.S. at 598-599 ("a treaty may also contain provisions which confer certain rights upon the citizens * * *, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country"). But, especially where implied rights are invoked, treaties will be construed to create individually enforceable rights only where the intent of the signatories is unmistakable because the right is clearly intimated by the express language in the treaty or is necessary to fulfill the overall purpose of the treaty.[10]

Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001) (relying on the *Head Money Cases* for same proposition as stated by Oregon Supreme Court); *Sorto v. Texas*, 2005 Tex. Crim. App. LEXIS 1622 (2005) (same); *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001) (same).

[10] The cases on which petitioner relies to challenge the Oregon Supreme Court's use of this presumption, Pet. Br. 31

Petitioner points to no language in the text of the Vienna Convention that expressly establishes the specific right he seeks to enforce against the receiving state. There is none. At best, petitioner seeks an implied right, based primarily on references in Article 36 to the "freedom" and "rights" of the foreign national. But an implied right that is enforceable by the individual against the receiving state is simply not to be found in the text or context of Article 36.

Viewed as a whole, the Vienna Convention addresses the rights and obligations of the signatories concerning consular relations. The broadly stated purpose of the treaty is to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems" and "to ensure the efficient performance of functions by consular posts on behalf of their respective States."

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n. 12, involve treaties with very different language and purposes than is found in the Vienna Convention. *Asakura, supra,* and *Jordan, supra*, both involved the Treaty of Commerce and Navigation between the United States and the Empire of Japan (1911), 37 Stat. 1504. That treaty began with an explicit and detailed enumeration of liberties secured for citizens or subjects of the signatory nations. These included the liberty to enter, travel, and reside in the country, to engage in trade or business, to own property, and to hire employees. Similarly, the 1881 treaty between the United States and Serbia at issue in *Kolovrat v. Oregon*, 366 U.S. 187, 191 n. 6 (1961), declared "There shall be reciprocally full and entire liberty of commerce and navigation between the citizens and subjects of the two high contracting powers, who shall be at liberty to establish themselves freely in each other's territory." In short, unlike the Vienna Convention, these treaties expressly conferred rights upon individual nationals of the signatory nations.

Preamble, App-1. Those functions are outlined in more detail in Article 5. App 1-3. Of the 79 articles, only Article 36 mentions any "rights" that a foreign national even arguably could enforce against a receiving state.

To be more precise, a textual analysis of Article 36 demonstrates that only Article 36(1)(b) defines obligations the competent authorities of the receiving state owe to a detained foreign national. In contrast, Article 36(1)(a)'s initial focus clearly is on the signatories, providing a general right of communication and access for the consular officers that is not limited to situations in which a foreign national is detained or otherwise within the control of the receiving state. Although it acknowledges that the foreign national has "the same freedom" of access and communication with the consular officer, it does not establish any general obligation for the receiving state or any specific obligations to a detained foreign national. The only obligation in Article 36(1)(a) that is imposed on the receiving state is to not interfere with consular communication or access either by restricting the consular officer or by restricting the foreign national.

Similarly, Article 36(1)(c) is an agreement between the signatories that consular officers of the sending state are entitled to have access to and communication with detained foreign nationals. Although the last sentence suggests an individual right, it is not a right that could be enforced against the receiving state. Rather, it would establish, at most, a right to oppose or prevent consular action on the individual's behalf—a right that could be enforced, if at all, only against the sending state.

If there is any individual right that could be enforced against the receiving state, it must be found in Article 36(1)(b). That subsection sets forth three obligations for the competent authorities of the receiving state: (1) to forward "[a]ny communication addressed to the consular post by the

person arrested, in prison, custody or detention * * * without delay;" (2) to notify the consulate of the sending state if a national of that state is detained, but only if the detained person requests it; and (3) to "inform the person concerned without delay of his rights under this subparagraph." Of those, only the last creates any direct obligation for the authorities of the receiving state to the detained individual. The first two are obligations the receiving state owes the sending state. Thus, from all the duties Article 36(1) defines, the only one that could arguably create an individual right vis-à-vis the receiving state is the duty to inform the detained foreign national of his "rights" under the section.

Both that duty and any right it implies are expressly limited by the introductory text of Article 36(1). That section makes it clear that the duty to inform—and all the other duties set forth therein—is established entirely "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State." Consular functions may benefit foreign nationals. But, given that qualifying language, it is clear that the obligations of the receiving state to facilitate those functions are owed to the sending state, not to the nationals of the sending state. Article 36(2) reaffirms that conclusion. It establishes that the convention's purposes—and the receiving state's laws, including its criminal laws—take primacy over any rights Article 36(1) purports to create. Those purposes include the efficient exercise of consular relations and the promotion of peace, security and friendly relations *between signatories*, not between signatories and the nationals of other signatories. *See* Preamble and Article 5, App 1-3. Certainly, none of the functions in Article 5 suggests that a purpose of the treaty was to provide foreign nationals with greater legal protections in a domestic criminal proceeding than a signatory provides to its own nationals.

The requirement that the receiving state inform the foreign national of his "rights under this subparagraph" does not establish the foreign national's "right" to enforce this obligation in any way. Nor does Article 36(1)(b) provide a basis for finding an implied right that the foreign national can enforce against the receiving state because it is not necessary to achieve the purposes of the treaty. The text and context of Article 36 demonstrate that the signatories intended to ensure the efficient performance of consular functions—functions that may benefit the foreign national. But, even when a treaty's purpose is to benefit individuals, it does not always follow that it creates an individually enforceable right. *See* Restatement (Third) of the Foreign Relations Law of the United States, Section 907 cmt. a, at 395 (1987) ("International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.").[11] As discussed above,

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[11] Compare, for example, the Geneva Convention of 1929, which clearly established agreements between the signatories designed to benefit individuals, but which this Court found provided no judicially enforceable individual rights. In *Johnson v. Eisentrager*, 339 U.S. 769 (1950), this Court noted that, although prisoners are entitled to the protections of the Geneva Convention, the treaty provides no basis for an individual claim against a signatory.

> These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against for-

there is nothing in the text of Article 36 or the larger context of the entire Vienna Convention that implies the intent to create that kind of right.

The treaty itself contains no remedies for violations. However, signatories who also subscribe to the Optional Protocol to the Vienna Convention (Optional Protocol) agree that "[d]isputes arising out of the interpretation or application of the [Vienna Convention] shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." 21 U.S.T. at 326, 596 U.N.T.S. at 488. Two points are significant. First, only signatories may bring a complaint to the International Court of Justice (ICJ). Article 34(1) of the Statute of the International Court of Justice, 59 Stat. 1055. Second, the effect of an ICJ decision is limited to the parties and the particular case resolved. Article 59, 59 Stat. 1055. Thus, a ruling by the ICJ cannot be enforced by a private individual in the courts of the member nations.

Thus, nothing in the text or context of the Vienna Convention expressly establishes that the signatories intended to cre-

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eign governments are vindicated only by Presidential intervention.

Id. at 789 n. 14. As with the Geneva Convention, it is not enough for petitioner to establish that the signatories to the Vienna Convention agreed to assume obligations that will, in some circumstances, benefit foreign nationals. Instead, petitioner must establish that the signatories intended to create rights that the individual could enforce against the receiving state and that these rights are so fundamental that a violation mandates suppression of otherwise admissible evidence in a state criminal proceeding.

ate rights to information or consular notification that a foreign national could enforce against a receiving state. Nothing in the text or context, including the purpose of the Vienna Convention and the optional remedy provisions, establishes a basis for finding an implied right that an individual could enforce against a receiving state.

B. The negotiation history of the Vienna Convention does not establish a right to information that is enforceable by an individual in a domestic criminal proceeding.

If there remains ambiguity about the proper construction of the treaty after examining the text and context, the Court next considers the history of the treaty including the negotiations leading to the treaty and its ratification history. *See Saks*, 470 U.S. at 400 (especially where the preparatory materials "are published and generally available to litigants, courts frequently refer to these materials to resolve ambiguities in the text"); *see also Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943) ("[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.").

The treaty preparation materials support the Oregon Supreme Court's construction. Petitioner's argument to the contrary is flawed in two principal ways. First, petitioner assumes that any reference by a nation's delegate to a "right" in connection with an individual supports the specific right petitioner claims in these proceedings. However, that assumption is premised upon petitioner's continued conflation of the various duties discussed in the negotiation of Article 36 and his erroneous formulation of the issue for this Court to decide. The proper question is not whether the delegates were aware that individuals would benefit from the obligations under-

taken by the signatory states. Rather, the question is whether the parties negotiating the convention intended to create a right that an individual detainee could enforce against the receiving state. They did not.

Second, petitioner suggests that the debate regarding Article 36(1)(b) divided the delegates to the conference into two camps: those who favored creating an individual right and those who were opposed to such a right. He asserts that the inclusion of the duty to inform a detained foreign national of his "rights" under this subsection demonstrates that the conference as a whole rejected the arguments offered in opposition to his alleged right. Pet. Br. 21-22. Analysis of the treaty preparation materials reveals that petitioner's formulation of the relevant debate and its outcome is wrong.

As initially drafted, Article 36(1)(b) would have required the competent authorities of the receiving state to notify the consulate automatically whenever a foreign national was detained, regardless of the individual's wishes. *See* International Law Commission (ILC) Draft Article 36, Volume II, U.N. Conference on Consular Relations: Official Records (Official Records), at 24, U.N. Doc. A/Conf. 25/16, U.N. Sales No. 63.X.2 (1963). The delegates from several countries—including those whom petitioner cites for support of his alleged right—strongly favored mandatory notification as the best mechanism to ensure that the consular functions described in Article 5 could be effectively implemented in order to protect their nationals abroad. *See* Volume I, Official Records, at 337-41, ¶¶ 2 (France), 11 (Korea), 12 (India), 15 (Greece), 18 (Tunisia), 21 (United Kingdom), 22 (Norway), and 28 (Spain); *see also id.*, at 37, ¶ 13-14 (U.S.S.R.).

Two principal concerns animated the opposition to the proposed text for Article 36(1)(b), neither of which involved the creation of rights for a foreign national against a receiving state. First, several delegates expressed concern that manda-

tory notification did not provide for circumstances where an individual wished not to involve his consulate—for example, if the case involved a minor offense such as drunkenness or if the foreign national were seeking to break off relations with his country. *See, e.g.*, Volume I, Official Records, at 337, ¶ 39 (U.S.); *id.* at 341, ¶ 37 (France). Second, many delegates indicated that mandatory notification would impose an excessive administrative burden upon the receiving state, especially those states which had large populations of immigrants or tourists. *See id.* at 336-37, ¶¶ 34 (Thailand), 35 (Japan), 36 (Canada), 40 (U.S.); *see also id.* at 337-39, ¶¶ 3 (France), 10 (Yugoslavia), 16 (Vietnam).

When it became clear that the subsection would either be amended to address those two concerns or the conference would conclude without the adoption of Article 36 in any form, several delegates in favor of mandatory notification relented. Seventeen delegations jointly proposed a compromise text that would have required mandatory notification if a signatory's national was detained "[u]nless he expressly opposes it." Volume I, Official Records, at 82, ¶ 54.

Not entirely satisfied that the proposed compromise would sufficiently alleviate the administrative burden on receiving states, twenty delegates jointly proposed to amend the phrase "unless he expressly opposes it" to "if he so requests." Volume I, Official Records, at 82, ¶ 62. As summarized in the official record, the delegate introducing the amendment argued that:

> The purpose of the amendment was to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which received many tourists and visitors. The language proposed in the joint amendment would ensure that the authorities of the receiving State would not be blamed if, owing to pressure of work or to other cir-

> cumstances, there was a failure to report the arrest of a national of the sending State. Also, by stating that the consul should be notified if the national of the sending State so requested, the amendment would avoid misunderstanding between the consulate and the authorities of the receiving State. It would thus serve one of the purposes of the convention on consular relations, which was to ensure that understanding and harmony should prevail in the relations between the receiving States.

See Volume I, Official Records, at 82, ¶ 62 (delegate from the United Arab Republic).

The British delegate expressed concern that a detained person who was unaware of his right to request the involvement of his consulate could render Article 36 ineffective if the amendment were adopted. Although the delegate maintained that his delegation preferred a mandatory and unqualified duty of consular notification, the delegate suggested that, if the conference preferred the amended proposal, his delegation could accept it if a related duty of informing the detained individual of his rights under the subsection were included. Volume I, Official Records, at 83-84, ¶¶ 73-74. The conference ultimately adopted the proposed text for subsection (1)(b) with the United Arab Republic and British amendments. *See* Volume I, Official Records, at 87, ¶¶ 108-112.

The negotiations reveal that the detained individual's "right" to request consular notification under Article 36(1)(b) was not adopted, as petitioner suggests, to create a right that that individual could assert against the receiving state. The conference adopted that language to minimize the administrative burden on the receiving state. Similarly, the adoption of the duty to inform a detained foreign national of his "rights" under subsection (1)(b) was not intended to grant that individual a right he could assert against the receiving state. In-

deed, the conference only adopted those "rights" out of concern that the *sending state* could abuse a mandatory notification requirement. Petitioner's assertions to the contrary are contradicted by the treaty's history.

Equally unsupportable is petitioner's assertion that the conference amended Article 36(2), as the British delegation proposed, in order to ensure that an individual could raise the alleged violation of his "rights" under Article 36(1) to overcome the criminal procedural laws of the receiving state. Pet. Br. 22-23. The delegate who proposed the amendment was adamantly in favor of a *mandatory* notification requirement that was unqualified by any purported individual "right" to request that his consulate be notified. *See* Volume I, Official Records, at 83-84, ¶¶ 73-74. That fact shows that the British delegation intended that the amendment that became Article 36(2) would ensure only that the laws of the receiving state would not impede the consular rights *of the sending state*.

Further, the British amendment to Article 36(2) expressly prioritized the efficacy of consular functions over any rights Article 36(1) purported to create. The text the ILC initially proposed provided that "[t]he rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations *must not nullify these rights*." Volume II, Official Records, at 24 (emphasis added). The British amendment proposed to alter that text to state "subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended." Volume II, Official Records, at 85 (emphasis added). That amendment subordinated whatever rights Article 36(1) created to the purpose behind creating those rights. And, as noted previously, the purpose behind the rights established in Article 36 is to "facilitat[e] the exercise of consular functions re-

lating to nationals of the sending State." Had the British delegation intended to ensure that the receiving state's laws could not preempt the *rights* created in that section—especially any purported individual rights—it easily could have proposed language that would have accomplished that goal. It did not. Consequently, the conference, in adopting that amendment, rejected any suggestion that an individual right, *per se*, could preempt the laws of the receiving state. There is, therefore, no evidence that Article 36(2) assists petitioner in his attempt to create an individual right that he could raise against the State.

In light of the above negotiations, there is little support for petitioner's claim that the conference intended to create an individual right that could interfere with a domestic criminal prosecution. Certainly where nothing expressly requires that result, it should not be inferred from general language addressing "rights" in the treaty discussions.

C. The ratification history of the Vienna Convention does not establish a right to information that is enforceable by an individual in a domestic criminal proceeding.

The ratification materials presented to the United States Senate when it considered and consented to the Vienna Convention support the Oregon Supreme Court's conclusion that the treaty was not intended to confer rights on a foreign national that would be enforceable in a domestic criminal proceeding. *See United States v. Stuart*, 489 U.S. 353, 365-68 (1989) (considering the ratification materials among the nontextual sources to aid in construing a treaty). The message from the State Department to the Senate was clear: the treaty would create no new rights that aliens could enforce to alter existing domestic laws. *See* S. Exec. Rep. No. 9, 91st Cong., 1st Sess. 18 (1969) ("The Vienna Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions.");

Senate Foreign Relations Committee, *Id.* at 2, ("The Convention does not change or affect present U.S. laws or practice.").

Consistent with the treaty preparation materials, the State Department described the information and notification requirement in Article 36(1)(b) as a solution that grants an individual the option of whether to involve the consul, while at the same time striking a balance between the receiving state's administrative burden and the sending state's effective implementation of the functions described in Article 5.

> The solution adopted by the Conference to the problem of adjusting the notification obligations of the receiving State to the right of the individual concerned to request notification lies in the final sentence of subparagraph 1(b). That sentence requires authorities of the receiving State to inform the person detained of this right to have the fact of his detention reported to the consular post concerned and of his right to communicate with that consular post. This provision has the virtue of setting out a requirement which is not beyond means of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad.

Ex. E, 91st Cong., 1st Sess., p. 60. Taken together with the statements that the treaty would not change existing domestic law, the State Department's presentation of Article 36 supports the Oregon Supreme Court's interpretation of the treaty.[12]

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[12] The State Department's description of Article 36 during the treaty ratification discussions also belies petitioner's assertion that the Executive Branch's construction of the treaty is a recently adopted litigation strategy. *See* Pet. Br. 25-26.

Petitioner argues that this same ratification history supports his position that the signatories intended to create individual rights. Pet. Br. 23-24. The difference in the two positions turns again on petitioner's failure to clarify the "right" he seeks under the treaty. As discussed above, it is not enough for petitioner to establish that the signatories were aware of individual benefits that might be obtained when the signatories fulfilled their obligations under the treaty. Instead, petitioner must establish an intent to create a right that the individual could enforce against the receiving state. The view of Article 36 that the State Department presented to the Senate is consistent with respondent's argument in this case. The State Department made clear that Article 36 creates an obligation on the part of the signatory that may benefit the foreign national, but it does not establish a right that the individual may enforce against the signatory.

D. Petitioner's interpretation of the Vienna Convention is inconsistent with the Executive Branch's interpretation of the treaty.

The State Department's view of the treaty is entitled to consideration and considerable deference beyond what it shows about the Senate's understanding of the treaty during the ratification process. "Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty." *El Al Israel Airlines v. Tseng*, 525 U.S. 155, 168 (1999); *see also Sumitomo Shoji America*, 457 U.S. at 184-85 ("Although not conclusive, the meaning attributed to treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight."); *Kolovrat*, 366 U.S. at 194 ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

The State Department consistently has taken the position that the Vienna Convention may benefit foreign nationals, but it does not create individual rights that can be enforced and remedied in the criminal justice systems of the signatories. *See United States v. Li*, 206 F.3d 56, 63-64 (1st Cir.) (*en banc*), *cert. den. sub nom Mu v. United States*, 531 U.S. 956 (2000). According to the State Department, "the [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Li*, 206 F.3d at 63 (quoted authority and quotation marks omitted). "The right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals when consular relations exist between the states concerned." *Id.*, quoting the Department of State Answers to the Questions Posed by the First Circuit. The State Department asserted this same position in two international tribunals, including the International Court of Justice, and in an advisory letter to State governors in 1970 and another advisory letter issued in 1989. *Id.* at 64.

The State Department's guidelines for implementing the Vienna Convention also provide some of the most useful nontextual resources for determining whether the treaty was intended to establish a right that an individual can enforce against a signatory and, in particular, whether information about consular notification must precede any law-enforcement interrogation. Although competent authorities are to contact the consul "as soon as reasonably possible under the circumstances," the State Department has said that contacting the consulate within 24 hours, or even as late as 72 hours, of the foreign national's request would comply. *See* U.S. Dep't of State, Consular Notification and Access 20, available at http://travel.state.gov/pdf/CNA_book.pdf (last accessed January 17, 2006). Additionally, the State Department notes that

the consul need not be notified outside of its regular working hours and nothing requires law-enforcement officers to delay an interrogation until the notification is completed and the consular official responds. *Id.*; *see also United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 991 n. 10 (S.D. Calif. 1999) (describing rough calculation that in two California counties in 1998, approximately 1313 aliens were apprehended each day and noting the serious difficulty that consular staff might have responding in a timely way to the requests for assistance).

This Court should give considerable weight to the State Department's reasonable views about the intended meaning of Article 36. Those views support the Oregon Supreme Court's construction of the treaty.

E. The interpretation of the Vienna Convention petitioner seeks is inconsistent with the interpretation of the treaty by other signatories.

In construing the meaning of a treaty, the Court considers how the treaty has been construed by the highest courts of other signatories. *See Saks*, 470 U.S. at 404 ("In determining precisely what causes can be considered accidents, we 'find the opinions of our sister signatories to be entitled to considerable weight.'") (citing *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2nd Cir. 1978), *cert. den.* 439 U.S. 1114 (1979)); *see also El Al Israel Airlines, Ltd.*, 525 U.S. at 176; *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) ("Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent

that their respective courts strive to interpret the treaty consistently.").[13]

Few of the highest courts of other signatories have considered the questions presented in this case.[14] However, the intent of many of the signatories is reflected in their actions adopting mandatory-notification treaties, which undermine petitioner's assertion that they intended the Vienna Convention to create an individually enforceable right. Despite Article 36(1)(b) and the apparent authority of the individual detainee to prohibit consular notification, many nations have entered into treaties under which the detaining state is obligated, regardless of the foreign national's wishes, to notify authorities of the sending state of the fact of detention. The State Department lists 58 jurisdictions with whom the United States has agreed to mandatory notification. *See* U.S. Department of State, Consular Notification and Access, *supra*, at 47-49. In each of these treaties, many with other signatories of the Vienna Convention, the countries have agreed to notify the consulate of the detention of a foreign national, notwithstanding any request on the part of the foreign national that the notification not occur.

These mandatory notification agreements suggest that some signatories, including the United States, did not view the Vienna Convention as establishing a right for the detained

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[13] The Court has cautioned against following the opinions of intermediate appellate courts of other signatories where there are substantial factual distinctions between the cases and where the respective courts of last resort have yet to speak. *Olympic Airways*, 540 U.S. at 655 n. 9.

[14] The amicus brief of law professors submitted in support of respondent discusses the handful of reported cases from other signatories addressing this issue.

foreign national to play any role in the notification decision. The treaties that pre-dated the Vienna Convention have remained in effect. They support the State's argument that, in negotiating the treaty, the delegates were concerned with the possibility that consular notification would not always be in the best interest of the individual, but that concern did not extend to creating any right for the individual to override decisions of the signatory. It is a stretch from recognizing—and attempting to minimize—the possible negative consequences of consular notification to a conclusion that the delegates sought to create a right that the individual foreign national could enforce against a signatory.

Additionally, the practice by other signatories confirms that they did not intend to create a right of suppression for violations of receiving state's obligations under Article 36. A State Department survey of 136 signatories demonstrates that the overwhelming majority of countries sees no link between interrogation of a foreign national and the duties of information, notification and access under Article 36.[15] Consequently,

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[15] Of the approximately 80 countries where consular notification is not mandatory, over 70 d not require their authorities to inform a detained foreign national of his right to contact his consulate prior to interrogation. *See* Declaration of Ambassador Maura A. Harty Concerning State Practice in Implementing Article 36(1) of the Vienna Convention on Consular Relations, U.S. Counter-Memorial in *Avena*, Annex 4, ¶¶ 16-19. Over 75 signatories do not require their authorities to stop an interrogation after an individual requests consular notification. At least four signatories expressly authorize *incommunicado* periods during which no consular access is permitted while five countries simply do not permit consular access until after the initial questioning of the individual is complete. *Id.* at ¶¶ 36-37. Finally, in only two countries is

petitioner's proposed construction of Article 36, rather than harmonizing the practice of the United States with that of the other signatories, would impose greater obligations and burdens on the United States than on other signatories who have not construed the Vienna Convention as creating rights enforceable in domestic criminal proceedings. *See Rocha v. State*, 16 S.W.3d 1, 17 (Tex. Ct. Crim. App. 2000) ("If we now find that the Vienna Convention treaty must be enforced through the exclusionary rule provided by [the state statute], Texas may soon find itself to be the *only* jurisdiction in the entire world that enforces the treaty through the use of an exclusionary rule sanction.") (emphasis in original; footnote omitted).

F. The decisions of the International Court of Justice also support the Oregon Supreme Court's interpretation of the Vienna Convention.

The ICJ decisions are, for the most part, consistent with the position respondent asserts here. Although, in both *LaGrand Case* (*F.R.G. v. U.S.*), 2001 I.C.J. no. 104 (June 27) and *Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. no. 128 (Mar. 31), the ICJ concluded that Article 36(1) creates individual rights, the court did not conclude that those rights were enforceable by the individual. Instead, consistent with the Optional Protocol, the ICJ concluded that violation of the obligations under Article 36 served as the basis for one signatory to bring an enforcement action against another signatory. *LaGrand*, 2001 I.C.J. Paragraph 77, at 493; *Avena*, Paragraph 40.

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there any evidence that failure to inform an individual of the right to consular notification might lead to the suppression of his incriminating statements. *Id.* at ¶ 41.

In *LaGrand*, Germany asserted that the United States had violated Article 36 by failing to inform the LaGrand brothers of their right to contact the German consul and that that failure prevented Germany from exercising its rights under the Vienna Convention. See ¶ 65. The United States did not dispute either that it had violated its obligation to provide the information to the LaGrand brothers or that this served as a basis for Germany's claim against the United States. The ICJ agreed and noted that, although not always true, the failure to provide information resulted in a breach of Germany's rights under Article 36(1)(a) and (c). ¶ 74. The ICJ also agreed with Germany that Article 36(1)(b) creates an individual right, but it is notable that the ICJ did not find a right *enforceable* by the individual detainee. Rather, the individual rights, "by virtue of Article I of the Optional Protocol, may be invoked in this Court *by the national State* of the detained person." ¶ 77 (emphasis added). Similarly, *Avena* was brought by Mexico against the United States for violations of the Vienna Convention alleged to have injured Mexico. ¶¶ 1, 40. This was as it had to be under the terms of the Optional Protocol and the limited authority of the ICJ to resolve disputes only between the signatories. Additionally, in both cases, once the ICJ determined that the United States had violated the Vienna Convention, the remedy was left in large part to the United States. *See LaGrand* ¶ 125.

The ICJ also has rejected an argument that Article 36(1) requires the receiving state to *immediately* inform a detained foreign national of the opportunity for consular notification before any interrogation occurs. Based in part on its review of the treaty preparation materials, the ICJ held that "neither the terms of the Convention as normally understood, nor its object and purpose, suggest that 'without delay' is to be understood as 'immediately upon arrest and before interrogation.'" ¶ 85. In addressing the preparatory materials, the ICJ noted

that discussions of the acceptable outer time-limit for notification ranged from one month to as short as 48 hours; because no agreement could be reached on a precise time period, the delegates settled on "without delay." ¶ 86.

> The Court thus finds that "without delay" is not necessarily to be interpreted as "immediately" upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph 1(b), that the receiving State authorities "shall inform the person concerned without delay of his rights" cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36.

¶ 87.[16]

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[16] Both the convention's text and the treaty preparation materials well support the ICJ's conclusion that the signatories did not intend the phrase "without delay" to impose an obligation to inform a detained foreign national of his rights either immediately or prior to interrogation. The treaty preparation materials make clear that the conference did not intend that the obligations created under Article 36 should interfere with a criminal investigation. The text originally proposed for Article 36(1)(b) required that consular notification take place "without undue delay" specifically to allow "for cases where it is necessary to hold a person incommunicado for a certain period for the purposes of the criminal investigation." *See* Volume II, Official Records, at 24. Although the conference amended the text to read "without delay" to reduce ambiguity in the obligation, it did not intend that amendment to mean immediately and certainly not prior to interrogation. *See* Vol-

Moreover, even when it found that lengthy detentions without notification violated the Vienna Convention, the ICJ did not—and could not—declare that suppression of evidence would be the appropriate remedy. As in the *LaGrand* case, the ICJ directed the United States "to permit review and reconsideration of these nationals' cases by the United States courts * * * with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice." ¶ 121. The ICJ expressly refused to presume "that partial or total annulment of conviction or sentence provides the necessary and sole remedy." ¶ 123.

Finally, the ICJ refused to address Mexico's claim "that the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention." ¶ 124. The ICJ observed, however, "that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux preparatoires*, support the conclusion that Mexico draws from its contention in that regard." *Id.*

Thus, although petitioner seeks to draw support for his position from the decisions of the ICJ, that support is very limited. Contrary to domestic authority, the ICJ has recognized that Article 36 creates individual rights. But, because of the limitations of the Optional Protocol and the court's jurisdiction, the ICJ has not construed Article 36 as creating rights that an individual foreign detainee can enforce against the re-

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ume I, Official Records, at 339, ¶ 15 (Greek delegation stating that a 10-day limit for notification would be adequate); *id.* at 339-40, ¶¶ 20-21 (British delegation noting that notification within 48 hours would be acceptable).

ceiving state in a domestic criminal proceeding. At most, the ICJ's opinions establish that, as a remedy for violations of the *signatory*'s rights under Article 36, the United States should seek to establish a procedure whereby a court can review the violation and determine whether there was any prejudice to the foreign detainee's criminal prosecution and, if so, determine an appropriate remedy. It would be a great leap from the ICJ's opinions to petitioner's assertion that he is entitled to suppression of lawfully obtained evidence without any showing of prejudice whatsoever.

In sum, petitioner fails to establish that Article 36 of the Vienna Convention creates a right that an individual can enforce against the receiving state in a domestic criminal proceeding. The text, context and history of the treaty instead support the construction adopted by the Oregon Supreme Court. Nor do the many amici who support petitioner establish a basis for construing Article 36 in the manner petitioner seeks. At the heart of many of amici's arguments is the assertion that it would be prudent and would promote the advancement of international law in this area if the Court would recognize an individually enforceable right to consular assistance for a detained foreign national. While that may be a laudatory goal, it is not one that can be achieved in this case for two reasons. First, the Court must construe the meaning of the treaty as it was adopted; changes in the intent of the signatories must be left to the political, not the judicial, process. *El Al Israel Airlines, Ltd.*, 525 U.S. at 171 n. 12 (where the balance of interests addressed in the Warsaw Convention may have shifted, it is not the role of the courts to alter the construction of the treaty; "Postratification adjustments * * * are appropriately made by the treaty's signatories."); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 537-39, 546 (1991) (Court looks to meaning of treaty at the time of its drafting; evidence that reflects subsequent meaning of terms used in treaty not

useful in construing the meaning of the terms as used in the treaty).

Second, even if the Court found within the treaty a general intent to promote consular assistance for a foreign national faced with a criminal proceeding, that would be insufficient to support the construction that the amici desire. It takes more than general references or aspirational language to establish an enforceable right; treaties are enforceable only to the extent they impose concrete obligations. *See, e.g., Immigration and Naturalization Service v. Stevic*, 467 U.S. 407, 428 n. 22 (1984) (describing language of United Nations Protocol Relating to the Status of Refugees that "merely called on nations to facilitate the admission of refugees *to the extent possible*" as "precatory and not self-executing") (emphasis in original). As this Court stated when addressing claims under the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577:

> The drafters of the Convention and the parties to the Protocol—like the drafters of § 243(h)—may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but *a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.*

Sale v. Haitian Centers Council, 509 U.S. 155, 183 (1993) (emphasis added).

This Court should affirm the Oregon Supreme Court's conclusion that Article 36 of the Vienna Convention does not create rights that a foreign detainee can enforce against the receiving state in a domestic criminal proceeding.

III. Even if the Vienna Convention is construed to create an individually enforceable right, suppression of lawfully obtained evidence in a state criminal proceeding is not a remedy for violation of that right.

The only remedy petitioner ever has sought for violation of the obligations imposed under the Vienna Convention is the suppression of statements he made during the hours immediately following his arrest. Petitioner made those statements after he repeatedly was advised, in both English and Spanish, of his *Miranda* rights. His waiver of the *Miranda* rights and his subsequent statements to law-enforcement officers were voluntary, making those statements lawfully obtained evidence. There is no legal basis for suppressing those statements in a state criminal proceeding. Nor is suppression required as a matter of good policy to ensure that state officials make their best efforts to comply with the requirements of the Vienna Convention.

As an initial matter, it is important to recognize that the State's violation of the Vienna Convention did not occur prior to petitioner making the statements he seeks to suppress. The treaty preparation materials and other non-textual material clearly establish that the obligation to inform a detained foreign nation under Article 36 is satisfied if the information is provided within 24-40 hours after the authorities determine an individual is a foreign national subject to the treaty. It is unclear precisely when the obligation arose in this case.[17] It is

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[17] Law-enforcement officers knew that petitioner spoke Spanish as well as English, had lived in and traveled to Mexico, and had a wife and children in Mexico. That does not establish that the officers knew petitioner was a foreign national. At best, the initial investigation may have provided the authorities enough information that they should have asked whether petitioner was a foreign national.

clear that it arose after petitioner voluntarily made the statements, which all were given within the first 12 hours of petitioner's arrest.

Even if petitioner's statements could be tied more directly to the State's violation of Article 36, suppression would not be the remedy for that violation. Historically, exclusion of coerced confessions was based in large part on the recognition that they are "inherently untrustworthy." *See Dickerson v. United States*, 530 U.S. 428, 433 (2000). Similarly, questions about the voluntariness of a confession focus on the circumstances that surround the interrogation and whether they suggest that the defendant's will was overborne. *Id.* at 433-34 (discussing voluntariness test under the Fifth and Fourteenth Amendments). At the same time, there are limits on the use of the exclusionary rule as a remedy, in part because of the recognition that suppressing lawfully obtained evidence imposes a hardship on the effective prosecution of criminal laws. *See Colorado v. Connelly*, 479 U.S. 157, 166 (1986) ("the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence.") (citations omitted). Given the long-standing legal and policy limitations on the exclusionary rule, this Court should reject petitioner's efforts to require suppression of lawfully obtained evidence as a court-ordered remedy for a violation of Article 36 of the Vienna Convention.

A. The Vienna Convention does not include a suppression remedy for violation of the signatory's obligation to inform a foreign national and to facilitate communication and access.

The starting point must again be with the text of the Vienna Convention. Nothing in the treaty expressly dictates the remedy to be imposed for violations of the signatory's obligation to inform a foreign national of the signatory's duties under Article 36(1)(b). As discussed above, nothing in the pre-

paratory materials or other relevant documents discuss what remedy would be required, assuming the individual has a right to enforce that obligation in a domestic criminal proceeding. Additionally, no federal statute or rule mandates a judicial remedy of any kind for the failure of a competent authority to provide the information required by Article 36(1)(b). Nor is there any basis from which to imply that the drafters and signatories to the Vienna Convention intended to impose a remedy of suppression of evidence in a domestic criminal proceeding.

The parties do not appear to disagree on this point. Petitioner does not suggest that the exclusionary rule is the appropriate remedy because it is a remedy expressly or impliedly found within the Vienna Convention itself. Instead, petitioner looks to domestic law as the basis for imposing this remedy. Pet. Br. 35-39.

B. Because Congress has not authorized suppression and because any individually enforceable right putatively created by the Vienna Convention would not be a right under our federal constitution, this Court cannot order suppression of evidence in a state criminal proceeding as a remedy for violation of that right.

Petitioner asserts that suppression is the appropriate remedy for the failure to notify petitioner of his Article 36 rights because "[i]n the United States criminal justice system, the government is denied the use of evidence that it obtains in violation of a constitutional provision, statue, or rule of procedure that defines or safeguards a critical legal right." Pet. Br. 35, *citing United States v. Blue*, 384 U.S. 251, 255 (1966). More particularly, he explains that "[t]his Court has not limited the use of the exclusionary rule to constitutional violations, but has suppressed confessions in circumstances where the integrity of the criminal proceeding was jeopardized." Pet.

Br. 37 (citing various cases). However, petitioner misreads the authority upon which he relies.

As stated above, this case does not present an instance in which either the treaty or any statute enacted by Congress requires or authorizes evidentiary exclusion as a remedy. When such a mandate or authorization is absent, this Court has unambiguously declared that its authority to intervene in state criminal prosecutions is limited to the enforcement of constitutional requirements. While the Court has supervisory authority over the federal courts and "may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals," *Carlisle v. United States*, 517 U.S. 416, 426 (1996), the Court lacks similar supervisory power over the courts of the several States. *Dickerson*, 530 U.S. at 438 (citing *Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension")); *Cicenia v. Lagay*, 357 U.S. 504, 508-09 (1958); *McNabb v. United States*, 318 U.S. 332, 340 (1943). Instead, the Court's authority "[w]ith respect to proceedings in state courts, * * * 'is limited to enforcing the commands of the United States Constitution.'" *Dickerson*, 530 U.S. at 438 (quoting *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991)).[18] In short, this Court has stated clearly that it lacks the power petitioner asks it to invoke.

Petitioner concedes, as he must, that any benefit Article 36 confers upon him is "not a constitutional right itself." Pet.

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[18] Examples include *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment privilege against self-incrimination); *Culombe v. Connecticut*, 367 U.S. 568 (1961) (Fourteenth Amendment due process requirement that confession be voluntary).

Br. 44; *see also* Pet. Br. 36 ("The treaty rights conferred by the Vienna Convention are on full parity with rights flowing from a Congressional statute."). That concession should put an end to petitioner's argument that this Court can require a state court to suppress voluntarily made statements to remedy a violation of the Vienna Convention. Nonetheless, petitioner argues that this Court should set aside his conviction and order that his confession be suppressed.

In support of this argument, petitioner points to two forms of precedent. First, petitioner relies on cases in which this Court has ordered evidentiary exclusion as a remedy in a state criminal prosecution for a constitutional violation. Pet. Br. 41, citing *Lynumn v. Illinois*, 372 U.S. 528 (1963) (admission of coerced confession violated Fourteenth amendment Due Process Clause); Pet. Br. 44, citing *Miranda v. Arizona*, 384 U.S. 436 (1966). Because, as petitioner concedes, any violation of the Vienna Convention is not a constitutional violation, these cases have no bearing on the present case.

Second, petitioner relies on instances in which this Court, in the exercise of its federal-court supervisory authority, has ordered the suppression of evidence obtained by law-enforcement authorities through violation of a statute or rule and offered by the government in a federal prosecution. Pet. Br. 37-39, citing *Miller v. United States*, 357 U.S. 310 (1958); *McNabb*, *supra*; and *Mallory v. United States*, 354 U.S. 449 (1957). Petitioner cites no authority, and the State is aware of none, that would permit the Court to extend the remedy imposed in these cases to a state criminal prosecution. Nor has petitioner otherwise explained why this Court could repudiate its previous declarations that it lacks authority to impose the exclusionary rule upon a state court as a remedy for a non-constitutional violation.

This is not to say that a violation of the Vienna Convention can play no role in a state criminal proceeding.[19] But a violation, in and of itself, is not a basis for suppressing lawfully obtained evidence, including statements made by the defendant during the initial law-enforcement investigation.

C. Even if suppression were available as a remedy for petitioner's asserted "right", this Court should reject petitioner's assertion that only suppression can adequately address violations of that right.

Interpretation, application, and enforcement of an international treaty is an area that traditionally has been an executive branch function. And there are good reasons for that. As the Ninth Circuit in *United States v. Lombera-Camorlinga* explained:

> The State Department indicates that it has historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law en-

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[19] It may be appropriate, for example, to consider violations of the Vienna Convention as part of the "totality of the circumstances" when a defendant asserts that statements he made to the police were not voluntary. Petitioner attempted to make that argument in the Oregon Supreme Court, but was prevented from doing so because he had failed to raise it in the trial court. But, properly presented, a defendant could argue that the failure to provide him consular access—or to inform him that he could have consular access—would be appropriate factors to consider in determining whether his waiver of his *Miranda* rights and his statements really were voluntary. Additionally, a defendant could invoke the State's pardon or clemency procedures to seek review of violations of the Vienna Convention.

> forcement to prevent future violations when necessary. The addition of a judicial enforcement mechanism contains the possibility for conflict between the respective powers of the executive and judicial branches. Moreover, the fact that the State Department is willing to and in fact does work directly with law enforcement to ensure compliance detracts in this instance from the traditional justification for the exclusionary rule: that it is the only available method of controlling police misconduct.

206 F.3d 882, 887-888 (9th Cir.)(*en banc*), *cert. den.* 531 U.S. 991 (2000) (citation omitted).

Petitioner argues that these traditional political remedies for violations of international treaties are insufficient. He claims that "the 36-year history of Article 36 in this country has been a virtually unbroken pattern of noncompliance and nonenforcement by state and local authorities." Pet. Br. 44. Contrary to petitioner's calamitous assertions, it is not true that this Court must impose suppression as a remedy for violations of the Vienna Convention because nothing else will prove effective. Pet. Br. 44-45.

Oregon and many other States have taken significant steps to ensure greater compliance. Oregon has worked with numerous interested parties to enhance awareness of the Vienna Convention requirements and simplify compliance. Oregon Attorney General Hardy Myers convened a group in September 2000 to explore ways in which Oregon law-enforcement officials could improve compliance with Article 36 of the Vienna Convention. *See* Peter Shepherd, *The Vienna Convention on Consular Relations: An Oregon Law Enforcement Perspective*, 11 WILLAMETTE J. INT'L L. & DISPUTE RES. 53, 58 (2004). As a result, police recruits and newly hired law-enforcement officers receive special instruction about the Vienna Convention and jail managers have agreed on a form of

notification to be used in all state jails to notify aliens of the requirements of the Convention. *Id.* at 58-59. In addition, the 2003 Oregon legislature strengthened the laws related to training requirements for law-enforcement officers on the requirements of the treaty and clarified the obligation of officers and others to comply with the notification requirement. Or. Laws 2003, ch. 109.

These voluntary efforts demonstrate that the suppression remedy is unnecessary to deter any allegedly unlawful conduct. And, perhaps more than any action the States can take to emphasize the obligations under the Convention, this Court's consideration of the issues last term and in the two cases this term will likely result in significantly greater awareness of those obligations across the country. It is not necessary for this Court to impose the extreme remedy of suppression in order to prompt state and local officials to do what they are required to do by law.

IV. Petitioner failed to show any prejudice.

Petitioner made no attempt in the trial court or the state appellate courts to establish that he suffered prejudice as a result of the State's failure to comply with the Vienna Convention information and notification requirements. Petitioner did not establish in the state trial court—and therefore could not establish in the state appellate courts—that he would have done anything differently in his interactions with the police if they had informed him of his "right" to consular notification. Nor did petitioner establish how the Mexican consul would have responded to notification had the police informed the consul of petitioner's arrest.

In *Breard v. Greene*, 523 U.S. 371 (1998), this Court expressed considerable skepticism that *any* remedy could be granted under the Vienna Convention without a showing of prejudice. The Court concluded that, even if a foreign national

has individually enforceable rights under the Vienna Convention, the individual must comply with procedural rules in order to bring a claim. *Id.* at 375-76. The Court noted that Breard's failure to raise his claim under the Vienna Convention in state court prevented him from obtaining an evidentiary hearing that would be necessary to establish his claim. "Without a hearing, Breard cannot establish how the Consul would have advised him, how the advice of his attorneys differed from the advice the Consul could have provided, and what factors he considered in electing to reject the plea bargain that the State offered him." *Id.* at 376. "Even were Breard's Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." *Id.* at 377.

The same problem exists in this case. Petitioner cannot now establish how compliance with the Vienna Convention would have had an effect on his confession, trial and conviction. Nor does petitioner offer any reason why this Court should disregard his failure to establish prejudice. Instead, petitioner flatly declares that "the prosecution in this case * * * had the burden of establishing the admissibility of petitioner's statements following the Article 36 violation." Pet. Br. 47-8. More particularly, he argues that "the prosecution had to establish that interfering with petitioner's right to communicate with the consulate and to receive the multiple benefits of consular assistance did not taint petitioner's subsequent decisions to continue with the interrogations and give self-incriminating statements." Pet. Br. 48. Petitioner's argument ignores his own obligation to establish a connection between the treaty violation and the evidence he seeks to suppress. This Court has placed the initial burden of establishing that connection on the criminal defendant. In *Nardone v.*

United States, 308 U.S. 338, 341 (1939), in which this Court was called upon to decide whether the government could make derivative use of illegally intercepted telephone conversations, the Court set forth the various evidentiary burdens that apply to determining whether evidence derived from unlawful police conduct should be suppressed:

> The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

See also Alderman v. United States, 394 U.S. 165, 183 (1969) (quoting *Nardone* in relation to evidence obtained as result of electronic surveillance conducted in violation of Fourth Amendment).[20]

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[20] Lower courts have described the defendant's burden "in terms of establishing a 'factual nexus' between the unlawful police conduct and the challenged evidence—at a minimum, the existence of a 'but-for' relationship." *State v. Johnson*, 335 Or. 511, 520, 73 P.3d 282 (2003), *citing United States v. Kandik*, 633 F.2d 1334, 1335 (9th Cir. 1980); *United States v. DeLuca*, 269 F.3d 1128, 1132 (10th Cir. 2001); *United States v. Nava-Ramirez*, 210 F.3d 1128, 1131 (10th Cir.), *cert. den.* 531 U.S. 887 (2000). Yet, though a "but for" showing by the criminal defendant is necessary, this Court has stressed that such a showing may not be sufficient to require suppression in every case. "Even in situations where the exclusionary rule is plainly applicable, [the Court has] declined to adopt a 'per se

The cases on which petitioner primarily relies – *Miller v. United States, McNabb v. United States* and *Mallory v. United States* – do not relieve him of the burdens described in *Nardone*. None of those opinions even discussed the assignment of evidentiary burdens. Moreover, each of those cases was decided upon a record (regardless of which party created it) that established both that the defendant had been subjected to an unlawful detention (*McNabb*[21] and *Mallory*) or search (*Miller*[22]) and that the evidence suppressed was obtained in the course of that unlawful detention or search. In such cases, this Court has observed that the answer to the initial question—whether the challenged evidence is the product of the government's unlawful conduct—"may be assumed." *New York v. Harris*, 495 U.S. 14, 19 (1990), quoting concurring opinion from 72 N.Y.2d 614, 625, 532 N. E. 2d 1229, 1235 (1988). But that is not petitioner's situation. The trial court found petitioner's statements voluntary, the Oregon appellate courts affirmed, and that factual issue has been conclusively resolved. There was no *Miranda* violation here. Nothing in

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or "but for" rule' that would make inadmissible any evidence * * * which somehow came to light through a chain of causation that began with an illegal arrest." *United States v. Ceccolini*, 435 U.S. 268, 276 (1978), quoting *Brown v. Illinois*, 422 U.S. 590, 603 (1975).

[21] "Benjamin [McNabb]'s confession was secured by detaining him unlawfully and questioning him continuously for five or six hours." 318 U.S. at 345.

[22] "The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed." 357 U.S. 313-14.

the treaty or domestic law rendered petitioner's otherwise lawful detention and interrogation unlawful solely because the officers failed to provide him the Article 36(1)(b) information. Therefore, in accordance with the assignment of evidentiary burdens set forth in *Nardone*, petitioner was required to come forward with evidence showing a connection between the treaty violation and the statements he sought to suppress.

More illustrative than the cases cited by petitioner is *New York v. Harris*, in which this Court was called upon to decide whether to suppress a stationhouse confession which, after two separate waivers of *Miranda* rights, was taken from a criminal suspect following his warrantless arrest from his home in violation of the Fourth Amendment, as interpreted in *Payton v. New York*, 445 U.S. 573 (1980). Although it was clear that the officers' warrantless entry into Harris's home violated the rule of *Payton*, the Court noted that there was nothing in the reasoning of *Payton* to suggest "that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house." 495 U.S. at 18. Following that reasoning, the Court concluded that "Harris' statement taken at the police station was not the product of being in unlawful custody. Neither was it the fruit of having been arrested in the home rather than someplace else." *Id.* at 19. Because the stationhouse confession "was not an exploitation of the illegal entry into Harris's home," *id.*, the Court declined to order suppression. In explanation of its holding, the Court stated that "attenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal government activity.'" *Id.*, quoting *United States v. Crews*, 445 U.S. 463, 471 (1980). Implicitly, the holding in *Harris* represented a finding that Harris failed to present evidence sufficient for that threshold determination.

Like Harris, petitioner made his statements after an arrest that was supported by probable cause and after waivers of *Miranda* rights that were knowing and voluntary. His custody and the custodial interviews remained lawful despite the treaty violation. To justify suppression of his statements as a remedy for the treaty violation, *Nardone*, *Harris* and logic itself require that, at a minimum, petitioner should have come forward with evidence to show that, but for the treaty violation, he would not have made incriminating statements to the police. Petitioner did not do so and cannot do so now.

CONCLUSION

This Court should affirm the judgment of the Oregon Supreme Court.

Respectfully submitted,

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January 31, 2006

The Preamble to the Vienna Convention states:

The States Parties to the present Convention,

Recalling that consular relations have been established between peoples since ancient times,

Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 5 states:

Consular functions consist in:

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

(b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;

(c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;

(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;

(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;

(f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;

(g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;

(h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;

(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribu-

nals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defense of their rights and interests;

(j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;

(k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;

(l) extending assistance to vessels and aircraft mentioned in sub-paragraph (k) of this Article and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State;

(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

Article 36 states:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

(17)

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IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

—v.—

STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OREGON

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SUMMARY OF ARGUMENT

Respondent and its *amici* concede that treaties can create individual rights, but they insist that Article 36 of the Vienna Convention on Consular Relations—and the secondary sources relied on to explain it—mean something other than what their plain words say. Respondent's tortured attempts to explain away text and history only serve to demonstrate that the obvious reading of Article 36 is the correct one: It creates individual rights, just as it says it does.

Respondent and its *amici* also repeatedly confuse treaty interpretation with U.S. constitutional law. This confusion pervades their arguments both on the existence of judicially enforceable individual rights and on the availability of a suppression remedy. Here, Article 36(1) of the VCCR confers rights, and Article 36(2) specifies that domestic procedures must give those rights full effect, but it is Article VI of the U.S. Constitution that makes those rights judicially enforceable in this country. In seeking an explicit judicial remedy in the treaty beyond the general direction provided by Article 36(2), Respondent and the United States ignore or distort the legions of cases in which this Court has enforced treaty rights without any requirement that the treaty itself mention judicial enforcement.

Respondent and its *amici* also fail to apprehend that because a treaty is federal law, the consequences of its violation are also matters of federal law, binding in both state and federal courts. The Article 36 rights of a detained foreign national—whether an alien in the United States or a U.S. citizen abroad—ensure that the individual is not denied the protections that the law affords because of unfamiliarity with the system or other unique disadvantages experienced by individuals caught up in the justice system of a foreign land. In the U.S. legal system, suppression of statements is the only remedy sufficient to give effect to rights under Article 36 in cases, like this one, in which a violation of those rights prejudices an individual's right against self-incrimination. Because the Oregon courts erred in holding that no remedy was available for the violation of Mr. Sanchez-Llamas's Article 36 rights, its judgment should be reversed.

ARGUMENT

I.

PETITIONER HAS INDIVIDUAL RIGHTS UNDER ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS THAT ARE JUDICIALLY ENFORCEABLE UNDER UNITED STATES LAW.

A. Article 36 Confers an Individual Right to Be Informed of the Rights of Consular Notification and Access.

1. Respondent Effectively Concedes That By Its Plain Language Article 36 Creates Individual Rights.

Respondent and the United States as *amicus curiae* both concede, as they must, that the VCCR is self-executing. Resp. Br. 9; U.S. Br. 14. They also concede that, as a result, the VCCR has the effect of a federal statute. *Id.*

Respondent and the United States further concede that treaties may create "individual rights"—that is, obligations owed by a nation directly to a private person as distinct from obligations solely between nations—even though those treaties are primarily agreements between nations. Resp. Br. 9, 14; U.S. Br. 11; *see also* U.S. Br. 13-14. Respondent even concedes that the obligation in Article 36(1)(b) to "'inform the person concerned without delay of *his rights* under this subparagraph' ... creates [a] *direct obligation* for the authorities of the receiving state *to the detained individual.*" Resp. Br. 17 (emphasis added); *see also id.* at 16.[1]

Respondent argues, however, that the import of the rights-creating provisions in Article 36 is "expressly limited by the introductory text of Article 36(1)." Resp. Br. 17. That text says that the obligations of Article 36(1) are created "'[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State.'" *Id.* (quoting Article 36(1)). According to Respondent, the goal of Article 36 to promote these consular functions somehow implies "that the obligations of the receiving state to facilitate those functions

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[1] Indeed, the Oregon legislature has enacted a statute directing that police officers in the state be trained to "identify situations in which the officers are required to inform a person of *the person's rights* under the convention." OR. REV. STAT. § 181.642(2) (2003) (emphasis added).

are owed to the sending state, not to the nationals of the sending state." *Id.*

The strained inferences Respondent tries to draw from the stated purpose of Article 36(1) should be rejected. As an initial matter, as Respondent recognizes, "'[a] treaty's plain language controls absent "extraordinarily strong contrary evidence.'" Resp. Br. 13 (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)). The plain meaning of the rights-conferring provisions of Article 36 would control over Respondent's speculative interpretation of Article 36's purpose even if that interpretation were plausible. Respondent offers no reason why the "rights" described in Article 36 should be interpreted as anything other than "rights."

Moreover, there is patently no merit in Respondent's suggestion that giving individuals "rights," VCCR art. 36(1)(b), is incompatible with the purpose of Article 36 to facilitate the exercise of consular functions. A consulate's core functions include "protecting in the receiving State the interests of the sending State *and of its nationals*" and *"helping and assisting nationals* ... of the Sending state." VCCR art. 5(a), (e) (emphasis added); *see also* Resp. Br. 17 (conceding that consular functions "may benefit foreign nationals"). Conferring on detained nationals the right to be informed of the availability of consular assistance obviously strengthens and safeguards the consulate's ability to fulfill that function.[2] After all, consulates exist to serve and protect their citizens, not *vice versa*.

Respondent and the United States assert that there is a "presumption" against treaties creating individual rights. Resp. Br. 13; U.S. Br. 11. That assertion has no support in this Court's precedents. Pet. Br. 31-35. On the contrary, this Court

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[2] Creating private rights is a common means of promoting a public purpose. *See, e.g., Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 125 S. Ct. 2444, 2447 (2005) (private right of recovery in *qui tam* suit under False Claims Act helps "polic[e] [the] proscription" against presenting fraudulent claims to the government); *Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453, 1455, 1458 (2005) (undisputed that statute enacted to "encourage the rapid deployment of new telecommunications technologies" created private "rights").

has repeatedly held that "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *Bacardi Corp. v. Domenech*, 311 U.S. 150, 163 (1940); *see also* Pet. Br. 17 (citing additional cases). As Petitioner has explained, Respondent's supposed presumption against individual rights rests entirely on lower courts' misreading of language taken out of context from this Court's decisions. *See* Pet. Br. 31-33.[3] The observation that most treaties do not create individual rights reflects the subject matter of most treaties, which affect matters in which no individual has a particular interest, rather than any bias against recognizing individual rights when the treaty concerns such rights.[4] Finally, even if there *were* such a presumption, it would be overcome here by the unambiguous rights-creating language of the treaty.

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[3] The United States also relies, U.S. Br. 12, on *Johnson v. Eisentrager*, 339 U.S. 763, 789 & n.14 (1950), but that case dealt only with whether United States district courts had jurisdiction to hear habeas corpus petitions by aliens detained outside the United States, not with whether any treaty created individual rights. *See id.* at 767-68, 790-91; *see also Rasul v. Bush*, 542 U.S. 466, 475-79 (2004) (construing *Eisentrager* as addressing only constitutional entitlement to habeas corpus review). Read in that context, the *Eisentrager* footnote cited by the United States says nothing about the application of treaties in cases *within* the jurisdiction of a United States federal or state court. Even were the footnote read to suggest a view about individual rights under the "scheme of the [a]greement" at issue there (namely, the now-superseded 1929 Geneva prisoner of war convention), 339 U.S. at 789 n.14, it would have no relevance to the different scheme of Article 36 of the VCCR.

[4] The United States quotes the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987), as stating that most treaties do not create individual rights, but omits the remainder of the quotation, which states that this is a question of treaty interpretation. *See* U.S. Br. 12. The United States also does not mention the text of the rule to which this comment is attached: "A private person having rights against the United States under an international agreement may assert those rights in courts in the United States of appropriate jurisdiction either by way of claim or defense." RESTATEMENT § 907(1).

2. The Extratextual Sources That Respondent Cites Confirm That the VCCR Creates Individual Rights.

Respondent's nontextual arguments against interpreting the VCCR in accordance with its plain terms also lack merit. As Petitioner has already explained, the VCCR's negotiating history, the understanding of the Executive Branch and Senate at the time of ratification, the longstanding subsequent practice of the United States, and the judgments of the International Court of Justice in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Mar. 31), and in the *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. No. 104 (June 27), all confirm that Article 36 creates individual rights. Pet. Br. 20-28. As Petitioner has also explained, the newly minted litigation posture of the United States in this case and in *United States v. Li*, 206 F.3d 56 (1st Cir. 2000), deserves no deference. *See* Pet. Br. 25-26.

Contrary to the suggestion of *amici* supporting Respondent, U.S. Br. 26 & n.9, Br. of Law Profs. Supporting Resp. 11-12, the decisions of foreign courts also overwhelmingly support the view that Article 36 creates an individual right to be informed of the right to request consular notification and access. For example, the German case relied upon by the United States, U.S. Br. 26 n.9, expressly holds that "not only does [VCCR Article 36(1)(b)] contain provisions between states, but it can also give rise to personal rights of the individual national under the conditions indicated therein." Judgment of Nov. 7, 2001, No. 5 StR 116/01, at 3 (BGH) (translated from German) (relying on *LaGrand* and on Article 36's use of the phrases "if he so requests" and "if he expressly opposes it").[5] Similarly, contrary to the United States' contention, the Australian court in *R. v. Abbrederis*, 51

[5] Regardless of the merits of the German court's questionable holding that existing German law was, with one exception, sufficient to give effect to the individual rights created by Article 36, *see id.* at 4, that holding obviously does not support the United States' contention that Article 36 creates no individual rights. Moreover, the decision predates the ICJ's *Avena* judgment, and a challenge to the decision is currently pending before Germany's Federal Constitutional Court. Nos. 2 BvR 2115/01, 2 BvR 2132/01, 2 BvR 348/03 (BVerfG).

F.L.R. 99 (N.S.W. Ct. Crim. App. 1981), did not hold that the Vienna Convention confers no individual rights, U.S. Br. 27 n.9, but rather interpreted Article 36 not to apply to ordinary questioning by customs officials at the border. 51 F.L.R. at 115. Numerous other cases from the courts of our treaty partners also either directly hold or assume without question that a detained foreign national has an individual right to be notified of the availability of consular assistance under VCCR Article 36. *See, e.g.*, NACDL Br. 16-23. Respondent and its *amici* are able to cite only a single foreign case suggesting otherwise, *Canada v. Van Bergen*, 261 A.R. 387, ¶ 15 (Alberta Ct. App. 2000), which the United States acknowledges is contrary to other case law in Canada and elsewhere, *see* U.S. Br. 26-27 n.9.

Indeed, 42 foreign nations have appeared as *amici curiae* in this case or in *Medellín v. Dretke*, 125 S. Ct. 2088 (2005), to state the position that Article 36 creates individual rights. No foreign nation has appeared as *amicus* in support of Respondent's position.

3. Whether a Treaty Confers an Individual Right Does Not Depend Upon the Subject Matter of the Right.

In the face of two centuries of decisions in which, the United States acknowledges, this Court "has given effect to self-executing treaty provisions at the behest of private individuals," the United States contends that "[m]ost of those cases involve explicit treaty provisions that guarantee to individual aliens freedom to exercise such peculiarly private rights as the ability to enter into contracts, engage in commerce, or own, devise, or inherit property on the same basis as United States citizens." U.S. Br. 13. The provisions of Article 36, the United States suggests, are "plainly of a different order from the commercial and property rights afforded by those treaties." *Id.*

The United States identifies no principled basis for its suggestion that treaty language addressing the property and commercial interests of foreign nationals should be read differently than similar language designed to protect the liberty and physical security of those same nationals. Surely that hierarchy of values would disturb Americans detained abroad who could otherwise rely on the rights reflected in Article 36. There is no reason to distort the normal means of

treaty interpretation because of the nature of the rights at issue here. It should come as no surprise, therefore, that this Court has repeatedly identified individual rights in treaties where individual liberty – not just property or commercial interests – was at stake. *See* Pet. Br. 33-34 & nn.13-14 (collecting cases).

United States v. Rauscher, 119 U.S. 407 (1886), is a prime example. There, the United States indicted an individual for crimes other than those for which Great Britain had extradited him, despite a treaty provision by which the United States had agreed to limit the prosecution to the offense charged in the extradition request. The treaty contained no statement that it created an obligation to individual criminal defendants. Nonetheless, this Court held that the indictment had to be dismissed because the defendant had a treaty right not to be prosecuted for the crime with which he was charged.[6]

B. The Supremacy Clause Requires That the Treaty Be Applied as the Rule of Decision Here.

1. Whether a Treaty Right May Be Judicially Enforced Is a Question of United States Constitutional Law.

Respondent and the United States argue throughout their respective briefs that Article 36 rights may not be invoked by an individual criminal defendant because no mechanism for judicial enforcement can be found in the VCCR itself. *See, e.g.*, Resp. Br. 6-7, 13-32; U.S. Br. 8, 17, 19. That argument confuses – in the most basic way – the international obligation that the United States has undertaken in the VCCR, on the one

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[6] The United States' suggestion, U.S. Br. 14, that *Rauscher* was based on statute or customary law is plainly wrong. In *Rauscher*, this Court dismissed an indictment on the basis of its interpretation of a treaty, 119 U.S. at 419-23, and only secondarily looked to a statute as settling "any doubt upon this construction of the treaty itself," not as to the treaty's enforceability, *id.* at 423. Indeed, in *Johnson v. Browne*, 205 U.S. 309, 317 (1907) (quoting *Rauscher*, 119 U.S. at 422), this Court expressly rejected the position now argued by the United States, and held that the treaty alone sufficed for *Rauscher*'s holding even without the statute. The Court emphasized in *Johnson* that "[t]he manifest scope and object of the treaty itself, *even without those sections of the Revised Statutes*, would limit the imprisonment as well as the trial to the crime for which extradition had been demanded and granted." *Id.* at 318 (emphasis added).

hand, and the means by which the United States gives effect to that obligation, on the other. The former is a matter of international law, while the latter is a matter of United States constitutional law—specifically, the Supremacy Clause. *See* Pet. Br. 8-9, 28-29. The failure of the Respondent and the United States to recognize this basic principle pervades their entire argument, both on the existence of an individual right and on the availability of a suppression remedy. Once the basic principle is recognized, their argument falls apart.

The VCCR creates an individual right, but like most treaties, largely leaves to the individual parties the specifics of how the treaty will be given effect in their own widely varying legal and constitutional systems. *See* Pet. Br. 28-29. The VCCR makes this explicit in Article 36(2), which provides that the rights conferred by Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

Different nations have adopted differing solutions to the question of how treaty provisions should be implemented in domestic law.[7] In *this* country, Article VI of the Constitution establishes that "all Treaties" ratified by the United States, like federal statutes and the Constitution itself, are part of the "supreme Law of the Land," so that they are binding on "the Judges in every State." A companion provision in Article III provides that treaty questions, just like federal constitutional and statutory questions, are within the federal "judicial Power." U.S. CONST. art. III, § 2.

Hence, in *this* country, the courts must ensure "the effect of a treaty as a part of the law of the land, as distinguished from its aspect as a mere contract between independent nations." *Rauscher*, 119 U.S. at 418; *see also id.* at 417-19 (quoting and explaining *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580,

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[7] Thus, contrary to what some of Respondent's *amici* suggest, the practice of foreign nations is not instructive on this point. The Supremacy Clause's provision for direct enforcement of treaties was a deliberate departure from the law of England and other nations. *See* Pet. Br. 12; *Rauscher*, 119 U.S. at 417-18.

598-99 (1884), and *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829)). As this Court has taught, that choice is given effect by applying a treaty as the "rule of decision" in any case in which it applies, just as if it were a federal statute. *Head Money Cases*, 112 U.S. at 599. Hence, just like a constitutional provision, *see Weeks v. United States*, 232 U.S. 383 (1914), or a statute, *see McNabb v. United States*, 318 U.S. 332 (1943), a treaty need not itself specify that it is judicially enforceable in order for a criminal defendant to invoke it in court, because the Supremacy Clause so specifies. [8]

2. A "Private Right of Action" Is Not at Issue.

Respondent and the United States as *amicus* also mischaracterize the question in this case as whether the VCCR gives Petitioner a "private right of action." Resp. Br. 6-7, 13-32; U.S. Br. 7-8, 11-30. This case, however, is a criminal prosecution, and the cause of action under Oregon's criminal statutes was invoked by the State of Oregon in prosecuting petitioner. *See* Pet. Br. 7, 9. It is beyond question that a party need not have a private cause of action to enforce a right *as a defense*.[9] The United States simply ignores the issue, treating

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[8] The availability of diplomatic or other remedies for treaty violations as between nations also does not negate the courts' role in giving effect to treaties as the law of the land. *United States v. Jung Ah Lung*, 124 U.S. 621, 632-33 (1888) (even explicit treaty provision for diplomatic negotiations did not "exclude[] judicial cognizance, or ... confine[] the remedy of a subject of China, ... to diplomatic action").

[9] *See* Pet. Br. 29 n.9; *compare Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 395-98 (1971) (recognizing, for the first time, private right of action under Fourth Amendment), *with, e.g., Weeks*, 232 U.S. at 393, 398 (decades earlier, allowing assertion of Fourth Amendment rights by criminal defendant). The United States relies on *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989); but that case holds only that, against the background expectation of sovereign immunity, a treaty creating a sovereign obligation should not be construed to imply a right to sue the sovereign or a waiver of immunity under the relevant provision of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(1). Indeed, *Amerada Hess* illustrates the distinction between a "right of action," which is limited by sovereign immunity, and a substantive "right," which is not. *Compare Amerada Hess*, 488 U.S. at 442-43 (sovereign obligation does not imply "right of

(footnote continued)

"right" and "right of action" as if they were interchangeable. Respondent acknowledges that treaties may be invoked by foreign nationals in United States courts "as shields against local or state governmental actions that breach the terms of those treaties," Resp. Br. 9-10, but fails to acknowledge that that is precisely the situation here: The state prosecuted Petitioner, and Petitioner invoked the treaty to limit the state's ability to do so. The Oregon courts may not ignore federal law—constitutional, statutory or treaty—in a case in which it applies.[10]

II.

SUPPRESSION IS THE REQUIRED REMEDY WHEN AN ARTICLE 36 VIOLATION LEADS TO EVIDENCE PREJUDICIAL TO A CRIMINAL DEFENDANT IN THE UNITED STATES.

A. The Appropriate Remedy for VCCR Violations in the United States Is a Question of Federal Law.

In arguing that this Court may not direct suppression of

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action" against sovereign), *with, e.g., Poindexter v. Greenhow*, 114 U.S. 270, 286 (1885) (one of the *Virginia Coupon Cases*, 114 U.S. 269 (1885); holding that state obligation could be asserted defensively, though sovereign immunity barred affirmative cause of action).

[10] From the founding of this Nation to the present day, this Court has enforced treaties in a wide variety of procedural postures. It has never required that the treaty itself create a "private cause of action" even when a party has sued directly for an injunction to enforce a treaty, much less when the treaty was invoked in a criminal prosecution, in a habeas corpus petition within the jurisdiction of a court authorized to issue the writ, or in a statutory or common-law civil action. *See, e.g.*, Pet. Br. 33-34 & nn.13-14 (collecting examples of cases dating from 1796 to 2003); *see also, e.g., El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 175 (1999) (ratified treaty preempted state common law in personal injury action); *cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 712, 720-25 (2004) (common law creates cause of action for certain violations of customary international law). Moreover, even if an "implied private right of action" were necessary here, the factors that this Court has identified as relevant to such a right of action—including the central requirement that such a cause of action be compatible with the legislative intent, or in this situation, the treatymakers' intent—would be amply satisfied. *Jogi v. Voges*, 425 F.3d 367, 384-85 (7th Cir. 2005) (citing, *e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001)).

statements as a remedy for a VCCR violation even if the foreign national has an individual right, Respondent and the United States make two fundamental errors. *First*, they repeat their error of insisting that the treaty itself do the work that treaties almost invariably leave to domestic law. By looking for a specific remedy within the treaty itself, they both ignore that judicial enforcement of treaties is governed by domestic law, *see supra* Part I.B.1, and disregard the plain language of Article 36(2) of the VCCR itself, which states that Article 36 rights must be given full effect in accordance with country's own procedures. *See* Pet. Br. 15-16, 39-41; *see also Avena* ¶¶ 138, 140-41 (Article 36(2) requires judicial evaluation of prejudice resulting from Article 36 violation).

Second, though conceding that this Court has frequently prescribed remedial rules that are binding in state courts, Respondent and the United States argue that this Court's power to do so is confined to violations of federal *constitutional* rights. Resp. Br. 42; U.S. Br. 31-32 (same). This Court's authority to develop remedies for the enforcement of federal law in state-court criminal proceedings, however, is firmly rooted in the Supremacy Clause, which provides that the Constitution, federal statutes and treaties made by the United States are *all* the supreme law of the land and binding on state courts. While this Court's recent cases in the state criminal-law context have mostly involved constitutional provisions, that is because the most commonly encountered federal restrictions on state criminal proceedings have come from the Constitution itself.

Because a ratified treaty is part of federal law, federal law prescribes the remedies for treaty violations and makes them binding on the state courts. Where federal law prescribes a substantive rule but leaves details of the remedy unaddressed, federal common law fills the gap. *See, e.g., Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957).[11] Where a

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[11] A self-executing treaty is the equivalent of a federal statute, and as with statutes, this Court has applied remedies even under treaties that, unlike Article 36(2), say nothing about domestic remedies. *See, e.g., Cook v. United States*, 288 U.S. 102, 121-22 (1933) (ordering dismissal of forfeiture proceeding to give effect to treaty allowing seizure of British

(footnote continued)

federal interest in uniformity is present in an area of specifically federal concern, this Court will adopt a uniform federal rule rather than borrow state law as the rule of decision. *See, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500, 505 (1988). Indeed, this Court has recognized that "international disputes implicating ... our relations with foreign nations" constitute one of the few uniquely federal areas in which the Court fashions uniform federal common law even in the absence of a statute or treaty governing the issue. *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 640-41 & n.13 (1981) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), and other cases).[12]

B. Suppression Is Required to Remedy the Treaty Violation in This Case.

Article 36(2) expressly requires that the rights set forth in Article 36(1) be given "full effect" in the United States legal system. The only way to give those rights "full effect" in the case of foreign nationals who are prosecuted criminally on the basis of inculpatory statements made when they have not been given the protection promised by Article 36(1) is to deny the prosecuting authorities—state or federal—the use of the confession to support a conviction. That conclusion follows from the intended purposes of the rights conferred by Article 36(1), from the special role of confessions in American criminal proceedings both legally and practically, and from the absence of any other adequate remedy.

The basic purpose of Article 36 is to protect detained foreign nationals. As the ICJ observed in *LaGrand*, Article 36

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ships only within one hour offshore, although treaty did not address such proceedings); *United States v. Jung Ah Lung*, 124 U.S. 621, 632-33 (1888) (granting habeas corpus to block exclusion of Chinese national that would violate U.S.-China treaty, although treaty referred only to diplomatic negotiations).

[12] *See also, e.g., United States v. Belmont*, 301 U.S. 324, 331 (1937) ("In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear."). Indeed, even a private party's rights and liabilities arising under the federal government's ordinary domestic contracts are governed by uniform federal common law. *Boyle*, 487 U.S. at 505.

rights constitute "an interrelated regime designed to facilitate the implementation of the system of consular protection." *LaGrand* ¶ 74; *see also supra* Part I.A.1. That regime addresses the specific situation of an individual who is deprived of his or her liberty and subjected to prosecution, and it recognizes the objective differences between the plight of such an individual in a foreign jurisdiction and in his or her own home country. Whether applied to aliens detained in the United States or to United States citizens detained abroad, *see* Pet. Br. 46, Article 36 does not confer special privileges on foreign nationals, but instead levels the playing field by ensuring that they understand and hence can meaningfully exercise the rights afforded under the law of the detaining country. *See* Mex. Br. 7-13; Honduras Br. 7-9; EU Br. 5-6; ABCNY Br. 16-23; NACDL Br. 12-15; Memorial of Mexico ¶¶ 56-60, *Avena*. A person arrested in a foreign jurisdiction—an American arrested in, say, Syria, or China, or Colombia—is in an acutely vulnerable position, and the prospect of custodial interrogation exacerbates that vulnerability. *See, e.g., U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on Int'l, Political and Military Affairs*, 94th Cong. 6 (1975) (statement of Hon. Leonard F. Walentynowicz, U.S. Dep't of State, Bur. of Sec. & Consular Affairs) ("With early access to each prisoner we are convinced we can go a long way toward guaranteeing the prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures.").

Criminal justice systems differ significantly from country to country, both in their formal rules and in their practical operation. Mex. Br. 10-11; NACDL Br. 13; ABCNY Br. 18. For example, some jurisdictions, including Mexico, do not consider confessions unless they are given in the presence of defense counsel and satisfy other requirements. *See, e.g.*, Mex. Br. 10; Memorial of Mexico ¶¶ 375-78, *Avena* (discussing other jurisdictions). Some jurisdictions, again including Mexico, do not permit a conviction based solely on a confession even when a confession is admissible. Mex. Br. 10. Conversely, in some inquisitorial systems, the accused may be interrogated formally and may have no right to remain silent. NACDL Br. 11.

The place of confessions in criminal law and practice in the United States is exceptional. Our system makes exceptional use of them and creates exceptional protections against their misuse. Prosecutors heavily rely on them, and juries commonly take them to be especially convincing proof of guilt. On the other hand, for these very reasons, safeguards against improvident use of confessions is deeply woven into the fabric of our legal tradition. U.S. CONST. amend. V; *id.* amend. VI. As Justice Frankfurter put it in *Rogers v. Richmond*, 365 U.S. 534, 541 (1961), "ours is an accusatorial and not an inquisitorial system."

In United States criminal practice, inculpatory statements made to police interrogators are admissible in evidence against a criminal defendant. A criminal defendant may be convicted on the basis of an uncounseled inculpatory statement. Although corroboration is required for conviction, all that usually needs to be corroborated is the corpus of the crime, not the defendant's identity as the perpetrator. On the other hand, once a defendant has been brought into the judicial process, he or she has an inviolable privilege against self-incrimination. The upshot of these features of our system is that police interrogation has become a primary evidence-gathering procedure. In recognition of its prominence—and of its dangers—and of our constitutional commitment to the privilege against self-incrimination, our legal system has evolved a sophisticated complex of rules designed to protect every citizen against being made "'the deluded instrument of his own conviction.'" *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (quoting Justice Frankfurter in *Culombe v. Connecticut*, 367 U.S. 568, 581 (1961) (quoting 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 595 (8th ed. 1824)). These include the rules requiring proof of voluntariness before an inculpatory statement can be admitted, guaranteeing arrested suspects the opportunity for legal representation during interrogation if they wish it, and excluding statements taken in violation of *Miranda* and its progeny. But while these rules may suffice to protect the ordinary citizen, foreign nationals as a class are ill-equipped to invoke their protection. That is precisely what Article 36(1) of the VCCR acknowledges and aims to correct. In the context of the United States legal system, therefore, the rights to consular

notification and access protected by Article 36 operate to secure fundamental safeguards considered essential to a fair proceeding. In determining the remedy that will give "full effect" to Article 36 rights in the United States legal system, this Court must take account of those features.

And the necessary remedy is readily at hand. The legal traditions of this country recognize the availability of a judicially-created exclusionary rule designed to give full effect to the Fifth Amendment right against self-incrimination, principally in order to protect against unreliable statements and deter unlawful police conduct. Pet. Br. 37, 45. Exclusion of inculpatory statements has been used to remedy both constitutional violations, *see, e.g., Miranda*, 384 U.S. 436, 467 (1966) and statutory violations, *see, e.g., McNabb v. United States*, 318 U.S. 332 (1943). In both cases, courts exclude confessions to prevent prejudice to the defendant flowing from unlawful conduct by the authorities and to maintain the integrity of the judicial process by denying the government as prosecutor the benefit of unlawful conduct. *See, e.g., id.* at 345.

As this case illustrates, a violation of Article 36 in circumstances where an incriminating statement has been taken implicates the same considerations that make available exclusion in the case of constitutional and statutory violations. *First*, an Article 36 violation deprives the arrested foreign national of the information that the treaty intends that he possess when making choices that have legal consequences—including choices concerning the exercise of constitutional rights relating to self-incrimination. Pet. Br. 41-44; Mex. Br. 9-11. Choices made without the requisite notice are not fully informed choices. *Cf. Oregon v. Elstad*, 470 U.S. 298, 310 (1985).

Second, an Article 36 violation increases the intrinsically coercive character of custodial interrogation, particularly for foreign nationals from jurisdictions where fear of police abuse is justified by the practice at home. The knowledge that a consular officer may be contacted for information and assistance is a vital safeguard to dispel the threat otherwise represented by police custodial interrogation. For example, the typical American arrested abroad will place infinitely greater faith in the prospect of information and assistance from an

American consular officer than from any local lawyer, court official, or *gendarme*.[13]

Given the purpose of consular notification and access, an Article 36 violation can impact a criminal prosecution in a way that implicates exactly the same concerns about unreliable confessions and unlawful police conduct which underlie the exclusion remedy in analogous contexts. Pet. Br. 44-48.[14] Yet neither Respondent nor the United States identifies any other remedy by which courts in the United States could fulfill their constitutional obligation to apply the treaty as the rule of decision and provide a remedy for its violation. Resp. Br. 43-45; U.S. Br. 34 n.13, 41. Respondent takes refuge in the possibility that "traditional political remedies for violations of international treaties," such as Oregon's voluntary compliance program, could potentially reduce the incidence of future violations in other defendants' cases. Resp. Br. 44-45. The

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[13] Contrary to the Government's assertion, U.S. Br. 37, 39, Mr. Sanchez-Llamas does not contend that interrogations must always cease until a consular officer is present. Interrogating authorities must give the notification without delay as soon as they have reason to know of an arrestee's foreign nationality and must facilitate consular communication and access, again, without delay. (In the present case, for instance, notification was required shortly after arrest and before incriminating statements were made, when officers had reason to know of Mr. Sanchez-Llamas's Mexican nationality.) If these requirements are met, there may be circumstances in which this Court could hold consistently with Article 36(2) that the rights conferred by Article 36(1) have been respected, and that interrogators could lawfully proceed. But that is a question for decision in a case that raises it, not Mr. Sanchez-Llamas's.

[14] Consistent with the use of the exclusionary rule in other contexts, it would not necessarily follow that confessions made in the context of a Vienna Convention violation could not be used for other purposes at trial, such as impeachment, or admitted in the rare circumstance in which a public emergency might justify noncompliance with Article 36. *Cf. Harris v. New York*, 401 U.S. 222 (1971) (statement that police obtain in violation of the *Miranda* rule can be used to impeach a defendant, provided the statement is otherwise "voluntary"); *New York v. Quarles*, 467 U.S. 649 (1984) (finding that officers' failure to provide *Miranda* warnings was justified or mitigated by a public emergency or other exigent circumstance).

United States suggests that the Executive Branch has the "primary responsibility for ensuring compliance with the VCCR," and hence that a ruling by this Court on an appropriate judicial remedy "would be inappropriate in light of a contrary executive branch determination concerning the steps necessary to ensure compliance with a treaty." U.S. Br. 34 n.13.

Again, Respondent and the United States fail to appreciate this Court's constitutional role in the enforcement of treaty rights. Contrary to the United States' suggestion, this Court cannot defer to the Executive's view of the enforcement regime reflected in the Supremacy Clause and Article III. Pet. Br. 39-41. Since the earliest days of the Republic, this Court has recognized that the Framers did not intend to leave the enforcement of individual treaty rights to the "voluntary" efforts of the several states or to the grace of the Executive Branch. Pet. Br. 25-26.[15] To the contrary, the judicial remedy of suppression provides the means by which the United States can give "full effect" to the Article 36 rights of criminal defendants.

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[15] Nor is it sufficient to subsume the Article 36 violation into an analysis of due-process voluntariness or the validity of a *Miranda* waiver. Resp. Br. 43 n.19; U.S. Br. 41. To be sure, facts underlying the Article 36 violation, as well as the violation itself, should be considered by courts analyzing these issues. But treaty rights constitute rights distinct from constitutional rights, so that an Article 36 violation would constitute an independent basis for relief. To address the treaty violation only insofar as it might contribute to the violation of a different, constitutional right would be contrary to this Court's enforcement of treaty rights on their own terms. Pet. Br. 29-34. Moreover, it would conflict with the ICJ's determination that in order to satisfy the "full effect" mandate of Article 36(2), the rights conferred by Article 36(1) must be given full weight by courts considering remedies for their violation. *Avena* ¶ 139 (rejecting United States argument that Article 36 violations can be addressed in the context of the due process rights arising under the U.S. Constitution). Finally, it would be contrary to this Court's long-standing jurisprudence to find that a waiver of *Miranda* rights somehow implies a waiver of Mr. Sanchez-Llamas's distinct rights under the Vienna Convention. *See, e.g.*, NACDL Br. 25-26 (citing cases).

C. An Article 36 Violation Requires That the Prosecution Show No Prejudice.

When the state seeks to introduce evidence at a criminal trial, it has the burden of proving its admissibility. *See* Pet. Br. 48. Hence, when an Article 36 violation has been shown, the state must demonstrate that the defendant has not been prejudiced. *Id.*[16] To the extent that Petitioner had a burden to produce *prima facie* evidence of an Article 36 violation, he met that burden when the prosecutor conceded that the police failed to meet their responsibility under Article 36.[17] At that juncture, the burden shifted back to the state to present competent, non-speculative evidence that advising Mr. Sanchez-Llamas of his Article 36 rights would not have affected the choices he made with regard to his legal rights. This could be done by demonstrating that Mr. Sanchez-Llamas would not have asserted his right to have the consulate

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[16] Respondent relies on *Breard v. Greene*, 523 U.S. 371 (1998), to place the burden on defendant, Resp. Br. 45, but in that case defendant was the plaintiff in a habeas corpus proceeding. Respondent also relies on various Fourth Amendment cases, Resp. Br. 47, but those cases involved the distinguishable question of whether an illegal search and seizure had, by "fruit of the poisonous tree" analysis, led to derivative evidence.

[17] In its response, Respondent suggests for the first time in the course of this litigation that the arresting officers did not know that Mr. Sanchez-Llamas was a Mexican national at the time of his arrest and eleven-hour interrogation. Resp. Br. 38-39. Any doubt on this point is quickly dispelled by review of the record. The duty to advise a foreign national of his Article 36 rights arises "once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national." *Avena* ¶ 63. Here, there was ample evidence that officers had reason to believe that Mr. Sanchez-Llamas was a Mexican national from the time he was first arrested. *See, e.g.*, Tr. 122-23, 129, 176 (officers gave *Miranda* warnings in Spanish because he understood little English); Tr. 124 ("[Arresting officers] asked about how long he had been in the United States. He said 7-11 years."); 177, 183 (informed officer he was from the state of Jalisco in Mexico). The United States agrees. *See* U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 18 (list of objective criteria for determining foreign nationality includes unfamiliarity with English and verbal statements indicating a place of birth outside the United States).

notified and would not have sought to communicate with the consulate, or that the Mexican consulate would not have provided any assistance. In addition, the state might try to demonstrate that its failure to provide notice was not prejudicial: for example, that the defendant had previously been advised of his or her consular rights and had waived them; or that the defendant's relations with his or her own country were such that he or she would not have wanted to attract its attention. Oregon made no such showing here.

If this Court should for any reason decide that an arrested national has the burden of showing prejudice, the case should be remanded to allow the state courts to make that determination in the first instance. Were Mr. Sanchez-Llamas required to demonstrate prejudice, he could do so even on this record, where the trial court refused to make prejudice findings as to the Article 36 violation in his case, upon holding—erroneously—that the treaty could not provide a remedy in the criminal prosecution against him. Mr. Sanchez-Llamas was subjected to an interrogation spanning over eleven hours in custody following a police beating severe enough to require that part of the interrogation be conducted over his hospital bed. Tr. 123, 129-134, 142. The record reflects that, at the time of his interrogation, Mr. Sanchez-Llamas spoke and understood very little English. It also demonstrates that he was confused about his legal rights under U.S. law. In particular, he did not understand the consequences of making statements to the police under U.S. law, which differ fundamentally from the consequences under Mexican law. *See* Mex. Br. 10. For example, when asked to describe the *Miranda* rights, Petitioner explained, "That it would be better if I told the truth and everything." Ex. 1, at 64. When asked if the officers had frightened him into cooperating, he answered that he understood that he would receive a longer sentence if he did not cooperate: "Yes, that, that, that I was going to, to be, ah, locked-up [*sic*] longer. That's what I remember that you told me, right? That, that, that I was going to have more, more trouble, that's all." Ex 1, at 66.

Consular officers could have dispelled these fundamental misunderstandings.[18] During the period when Mr. Sanchez-Llamas was arrested, as today, Mexico provided comprehensive consular assistance to its nationals detained in the United States, including by explaining their legal rights while under interrogation. *See* Mex. Br. 11-13; ABCNY Br. 20-21. There is no indication that for any reason Mr. Sanchez-Llamas would have refused Mexican consular assistance had he been advised of his Article 36 rights.

CONCLUSION

For these reasons and the reasons set forth in petitioner's opening brief, petitioner respectfully requests that the Court reverse the judgment of the Supreme Court of Oregon, set aside petitioner's conviction and sentence, order petitioner's confession suppressed, and remand the case for a new trial.

Respectfully submitted,

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[18] Mr. Sanchez-Llamas even made incriminating statements that were affirmatively proven untrue at trial. For example, during the interrogation, Mr. Sanchez-Llamas admitted firing two guns, Ex. 1, at 24, 50, apparently because he believed that is what the police wanted him to say, but the evidence at trial established that only one of the two guns had been fired, Tr. 485, 584-85, 719-20, 730, 771 (five or six shots from chrome .357 magnum revolver); *id.* at 732 (no shots from other gun).

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Nos. 05-51 and 04-10566

In the Supreme Court of the United States

MARIO A. BUSTILLO, PETITIONER

v.

GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS

MOISES SANCHEZ-LLAMAS, PETITIONER

v.

STATE OF OREGON

ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA
AND THE SUPREME COURT OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-101, 596 U.N.T.S. 261, 292, 294, creates individual rights that may be judicially enforced in a criminal case at the behest of a criminal defendant (Nos. 04-10566 & 05-51).

2. Whether a violation of Article 36's requirement that a detained foreign national be advised of his rights to have consular officials informed of his detention and to communicate with the consular post requires the suppression of a detainee's statements to the police (No. 04-10566).

3. Whether state courts may preclude a defendant from raising a claim under Article 36 based on the defendant's procedural default in failing to raise the claim at trial (No. 05-51).

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In the Supreme Court of the United States

No. 05-51

MARIO A. BUSTILLO, PETITIONER

v.

GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS

04-10566

MOISES SANCHEZ-LLAMAS, PETITIONER

v.

STATE OF OREGON

ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA
AND THE SUPREME COURT OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case involves the questions whether Article 36 of the Vienna Convention on Consular Relations (Vienna Convention), April 24, 1963, 21 U.S.T. 77, 100-101, 596 U.N.T.S. 261, 292, 294, creates individual rights that may be judicially enforced in a criminal case at the behest of a criminal defendant, and, if so, whether a violation of Article 36's requirement that a detained foreign national be advised of his rights to have consular officials informed of his detention and to communicate with the consular post requires the suppression of a detainee's statements to the police, and whether a State's ordinary principles of waiver and procedural default may preclude a defendant from raising a claim under Article 36 based on the

defendant's failure to raise the claim at trial. The United States has a substantial interest in the interpretation and effect that courts in the United States give to international instruments to which it is a party and therefore has a considerable interest in the resolution of this case. The United States has participated in previous cases raising similar questions. See, *e.g.*, *Medellin* v. *Dretke*, 125 S. Ct. 2088 (2005) (per curiam); *Breard* v. *Greene*, 523 U.S. 371 (1998) (per curiam).

STATEMENT

1. The Vienna Convention

In 1969, with the advice and consent of the Senate, see 115 Cong. Rec. 30,997, the United States ratified the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36 of the Vienna Convention, 21 U.S.T. at 100-101, 596 U.N.T.S. at 292, 294, is designed to "facilitat[e] the exercise of consular functions relating to nationals of the sending State." Toward that end, Article 36 provides that "consular officers shall be free to communicate with nationals of the sending State and to have access to them." *Id.*, art. 36(1)(a).

Article 36 further provides that "[i]f [a foreign detainee] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." Vienna Convention, art. 36(1)(b). In addition, "[a]ny communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay." *Ibid.* State authorities "shall inform the person concerned without delay of his rights under [Article 36(1)(b)]." *Ibid.*

Article 36 also provides that "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with

him and to arrange for his legal representation." Vienna Convention, art. 36(1)(c). It specifies that consular officers also "have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment." *Ibid.* At the same time, it provides that "consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action." *Ibid.*

The rights referred to in Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State." Vienna Convention, art. 36(2). That requirement is "subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *Ibid.*

At the time the United States ratified the Vienna Convention, it also ratified an Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (Optional Protocol), Apr. 24, 1963, 21 U.S.T. 77, 325, 596 U.N.T.S. 487. Parties to the Optional Protocol may submit "[d]isputes arising out of the interpretation or application of the Convention" for resolution by the International Court of Justice (ICJ). Optional Protocol, art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488. Like all decisions of the ICJ, however, decisions in cases submitted to the ICJ under the Optional Protocol have "no binding force except between the parties and in respect of that particular case," Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1055, 1062. On March 7, 2005, the United States noticed its withdrawal from the Optional Protocol. See *Medellin* v. *Dretke*, 125 S. Ct. 2088, 2101 (2005) (O'Connor, J., dissenting).

2. State Court Proceedings

a. *Bustillo, No. 05-51.* (1) On the night of December 10, 1997, James Merry was struck in the head by a young man wielding a baseball bat while standing outside a Popeyes Res-

taurant in Springfield, Virginia. Merry later died as a result of his injuries. Based on the statements of several witnesses to the attack, Bustillo, a Honduran national, was arrested and charged with murder. 05-51 Pet. App. 39a; 05-51 Br. in Opp. 4. The arresting authorities did not inform Bustillo that he could have the Honduran consulate informed of his detention if he so desired. 05-51 Br. in Opp. 4.

At trial, several prosecution witnesses identified Bustillo as the one who struck Merry with the bat. One of the witnesses knew Bustillo from classes they had together at school; the others separately identified him from a photo spread. Shortly before the attack, Bustillo and other members of his street gang had confronted Merry inside the restaurant while he was eating dinner with the three individuals who later identified Bustillo as Merry's killer. The witnesses recalled that Merry's attacker had been wearing a red shirt, as had Bustillo that evening. 05-51 Pet. App. 39a; 05-551 Br. in Opp. 2-5.

The defense's theory was that Merry's attacker was another individual known as "Sirena." A member of Bustillo's gang stated that he saw a man he knew as "Julio" or "Sirena" approach Merry and strike him with a bat, and a woman who was standing next to Merry when he was struck testified that Bustillo was not the assailant although she did not know who the attacker was. 05-51 Pet. App. 31a-32a. Another witness testified that she had seen "Sirena," whose last name she did not know, on a plane to Honduras the day after Merry died. 05-51 J.A. 205. The jury found Bustillo guilty of first-degree murder, and he was sentenced to imprisonment for a term of 30 years. 05-51 Pet. App. 19a.

(2) Bustillo, who was represented by counsel, did not object at trial that the State had failed to inform him that he could contact his consulate, nor did he raise the issue in his post-trial motion to set aside the jury's verdict or on appeal. 05-51 Pet. App. 47a. On direct review, Virginia's intermediate appellate court affirmed Bustillo's conviction and sentence,

Bustillo v. *Commonwealth*, No. 2321-98-4, 2000 WL 365930 (Va. Ct. App. Apr. 11, 2000) (unpublished), and the Supreme Court of Virginia refused a petition for further appeal, J.A. 9. This Court denied Bustillo's petition for certiorari. *Bustillo* v. *Virginia*, 532 U.S. 1072 (2001).

Following direct review, Bustillo petitioned for state habeas corpus relief, alleging for the first time that his right to consular notification under the Vienna Convention had been violated and that he was entitled to reversal of his conviction as a result. 05-51 Pet. App. 40a. Alternatively, Bustillo argued that his retained trial counsel was ineffective in failing to advise Bustillo of his right to consult with the Honduran consulate. *Id.* at 47a. The state habeas court denied Bustillo's Vienna Convention claim without addressing the merits. The court ruled that the claim was procedurally barred by Bustillo's failure to assert it "during trial and through the appellate process." *Id.* at 43a. The court also held that Bustillo's Vienna Convention-based ineffectiveness claim was procedurally barred. *Id.* at 47a. The habeas court granted Bustillo an evidentiary hearing on the separate question whether the prosecutor failed to disclose exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). 05-51 Pet. App. at 48a. Although the court found that the evidence was exculpatory, *id.* at 34a-35a, it determined, after a second hearing, that Bustillo's defense had not been prejudiced and denied the habeas petition, *id.* at 15a-16a.

The Supreme Court of Virginia refused a petition for appeal, ruling that Bustillo had not properly perfected his appeal with respect to the *Brady* claim and that "there is no reversible error" with respect to the Vienna Convention claim. 05-51 Pet. App. 1a; 05-51 Br. in Opp. 11. This Court granted certiorari limited to the Vienna Convention issue. See 126 S. Ct. 621 (2005).

b. *Sanchez-Llamas, No. 04-10566.* (1) Sanchez-Llamas, a Mexican national, was arrested in December 1999 after an exchange of gunfire with police officers, in which he wounded

one officer in the leg. 04-10566 Pet. App. 15. Shortly after Sanchez-Llamas's arrest, officers apprised him in both English and Spanish of his *Miranda* rights, which he waived. *Id.* at 15 & n.2. The officers did not additionally inform Sanchez-Llamas that he could request that the Mexican consulate be notified of his detention. *Ibid.* During questioning, Sanchez-Llamas made incriminating statements. *Id.* at 16. He was thereafter charged with attempted murder, attempted aggravated murder, and various other crimes. *Ibid.*

Before trial, Sanchez-Llamas moved to suppress evidence of his post-arrest statements on the ground that he "was not advised of his right to consult with the Mexican Counsel." 04-10566 Pet. App. 3. The trial court denied Sanchez-Llamas's suppression motion, ruling that a violation of the Vienna Convention does not require the suppression of the defendant's incriminating statements as a remedy. *Id.* at 10. Sanchez-Llamas was thereafter convicted of 11 felony counts and sentenced to imprisonment for 246 months. *Id.* at 16.

(2) The Oregon Supreme Court affirmed. In rejecting Sanchez-Llamas's Vienna Convention claim, the court recognized "the general rule * * * that rights created by international treaties belong to the signatory state and are *not* enforceable in American courts by private individuals," absent "a specific intent to create such [enforceable] individual rights [that] can be discerned from the treaty as a whole." 04-10566 Pet. App. 18. Although "Article 36 expressly refers to the detained foreign national's 'rights' to consular access and notification," the court stated that Article 36's "mere use of the term 'rights' cannot, by itself, support an intent to require signatory states to allow individual detainees to enforce those 'rights' in a criminal proceeding against them—particularly when the treaty does not specify the nature of the declared 'rights' or any remedy that is required for their breach." *Id.* at 20-21. The Oregon Supreme Court found it more likely that the Convention's drafters had used the phrase informing a prisoner of his "rights" as a shorthand "way of describing

what [information] a receiving signatory state must tell a foreign detainee." *Id.* at 21. This interpretation was bolstered, the court continued, by language in both the treaty's preamble and Article 36's introductory clause suggesting that "the treaty and Article 36 are concerned with relationships and obligations among *nations*, not with individual rights." *Ibid.*

Absent any "clear intention" that would negate the general presumption against enforcement of treaty provisions by private individuals, the Oregon Supreme Court concluded "that the obligations that Article 36 describes are enforceable only by the affected signatory states and not by individual detainees." 04-10566 Pet. App. 22. The court therefore rejected Sanchez-Llamas's claim that his statements should be suppressed as a consequence of the Vienna Convention violation. *Id.* at 22-23. The Oregon Supreme Court declined, as a matter of discretion, to address Sanchez-Llamas's claim that the waiver of his *Miranda* rights was not voluntary. *Id.* at 15 n.2. This Court granted a petition for certiorari on the questions whether the Vienna Convention confers an individually enforceable right and, if so, whether suppression is the proper remedy for such a violation. See 126 S. Ct. 621 (2005).

SUMMARY OF ARGUMENT

1. Article 36 of the Vienna Convention on Consular Relations does not create an individually enforceable right that a criminal defendant may assert to attack his conviction and sentence or to suppress evidence. Article 36 requires parties to the Convention to notify a detained foreign national that he may request consular assistance. But the text does not authorize private enforcement of that provision in court. It has long been established that, absent a clear indication to the contrary, an international treaty is addressed solely to the rights of States and not private individuals; that is particularly true of a treaty that bears on sovereign conduct and the relations between States. The Vienna Convention reflects that understanding in express terms in its preamble, and

again in Article 36, by confirming that the Convention is intended to facilitate the provision of consular services, not to create individual rights. Nothing in the Vienna Convention's text or history overrides that understanding or justifies recognizing a novel, judicially enforceable right of an individual to assert a violation of Article 36 in a criminal prosecution.

Any suggestion that the parties to the Convention intended, by its adoption, to create such a judicially enforceable individual right is contradicted by the historical context in which the Vienna Convention was approved, as well as by the 40 years of practice under it. Neither petitioners nor their amici offer a single unambiguous example in the 40-year history of the Vienna Convention from any of its 161 parties of an individual defendant being afforded a remedy in his criminal case on the basis of a Vienna Convention violation. And the Executive Branch has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right to challenge his conviction and sentence. That clearly expressed view of the Executive Branch on the meaning of a treaty "is entitled to great weight." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989) (quoting *Sumitomo Shojo Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982)).

Against all of that, the reasoning of the International Court of Justice in *Avena and other Mexican Nationals (Mexico* v. *United States)* (*Avena*), 2004 I.C.J. 12 (Mar. 31), that the Vienna Convention creates judicially enforceable individual rights should, after "respectful consideration," *Breard* v. *Greene*, 523 U.S. 371, 375 (1998) (per curiam), be rejected. The United States is obligated to comply with the judgment in that case, and the President has acted to ensure such compliance. But the United States has no obligation to accept the reasoning underlying that judgment, or to apply it in other cases. The ICJ's reasoning in *Avena* lacks sufficient support in the basic rules of treaty interpretation and contradicts the intention and practice of the parties to the Convention. The responsibility for interpreting the Convention as a

matter of United States law rests with this Court and with the Executive Branch, whose views are due great deference, and the relevant legal principles and evidence establish that the ICJ's interpretation is incorrect.

2. Even assuming that a receiving State's failure to comply with the Convention's consular notification provisions could give rise to an individually enforceable right, suppression in state court of a detainee's voluntary confession, given after a valid waiver of *Miranda* rights, would not be an appropriate remedy. The Court has no authority to impose an exclusionary rule on the States as an exercise of the Court's supervisory authority. *Dickerson* v. *United States*, 530 U.S. 428, 438 (2000). Because there is no assertion that the Constitution or a federal statute mandates a suppression remedy, if this Court is to require exclusion of evidence as a remedy for a State's violation of Article 36, that rule must be found in the Vienna Convention itself.

There is nothing in the text or history of the Vienna Convention to suggest that its drafters intended suppression of statements made by a foreign national who was not told that he could request consular notification. Indeed, the idea that the drafters would have envisioned suppression of a voluntary confession as a remedy is difficult to square with the fact that, in most nations, the exclusionary rule had not taken root at the time of the Convention's drafting (and, indeed, still has not). Even considering United States practice in particular, the Vienna Convention was drafted years before this Court decided *Miranda* v. *Arizona*, 384 U.S. 436 (1966)—and the Convention was ratified in this country shortly after Congress attempted to overrule *Miranda*. Any suggestion that the Convention implies a suppression remedy because it serves to protect the effective exercise of a detainee's right against self-incrimination cannot withstand scrutiny. Quite apart from the absence of a textual foundation for that position, in many countries, consular officials—and in some countries even the detainee's lawyers—would not be allowed access to a detainee

until after the preliminary period of interrogation is concluded. The drafters, therefore, cannot have had an implicit understanding that the admissibility of a confession would be tied to full compliance with Article 36(1)(a).

3. Finally, even assuming that the Vienna Convention conferred individual rights that are enforceable by defendants in criminal proceedings, nothing in the Convention precludes a State from requiring, as a matter of its procedural rules, that a claimed violation of Article 36 be raised before or during trial. "[R]ights" under Article 36 "shall be exercised in conformity with the laws and regulations of the receiving State," and this Court held in *Breard* that procedural default rules do not prevent "full effect to be given to the purposes for which [Article 36 rights] are intended," as Article 36(2) provides. 523 U.S. at 375. A procedural-default rule does not prevent the purposes of Article 36 from receiving "full effect," any more than it denies full effect to constitutional guarantees that are likewise subject to default. While the President has determined that the United States will comply with the *Avena* judgment by reviewing and reconsidering the convictions and sentences of the 51 Mexican nationals covered by it, notwithstanding state procedural default rules, there is no obligation to accept the ICJ's interpretation of Article 36(2) with respect to other cases, and the Executive Branch does not.

Practical and policy reasons provide no basis for allowing Article 36 claims to be raised on collateral review even if not preserved at trial. Unlike a claim of ineffective assistance of counsel, cf. *Massaro* v. *United States*, 538 U.S. 500 (2003), trial counsel can readily recognize and seek a remedy for Vienna Convention violations, just as counsel does for *Miranda* violations and a host of other claims. The absence of notice to the defendant does not preclude counsel from recognizing a possible legal claim (as the preserved claim in No. 04-10566 demonstrates). And requiring adjudication of Vienna Convention claims at trial would ensure that they could be redressed

in a timely fashion, without the need to upset a final verdict and require a new trial.

ARGUMENT

THE VIENNA CONVENTION DOES NOT PROVIDE A BASIS ON WHICH PETITIONERS MAY CHALLENGE THEIR CRIMINAL CONVICTIONS

I. ARTICLE 36 DOES NOT CONFER INDIVIDUALLY ENFORCEABLE RIGHTS

A. Treaties Are Presumed To Be Enforceable By States, Not By Individuals, Absent A Clear Indication To The Contrary

It is a long-established presumption that treaties and other international agreements do not create judicially enforceable individual rights. As this Court stated in the *Head Money Cases*, 112 U.S. 580 (1884), "[a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Id.* at 598. When a treaty violation nonetheless occurs, it "becomes the subject of international negotiations and reclamations," not judicial redress. *Ibid.* See *Charlton* v. *Kelly*, 229 U.S. 447, 474 (1913); *Whitney* v. *Robertson*, 124 U.S. 190, 195 (1888) (issues of compliance with treaty obligations are "not judicial questions"; rather, "the power to determine these matters ha[s] not been confided to the judiciary * * * but to the executive and legislative departments of our government; * * * they belong to diplomacy and legislation, and not to the administration of the laws"); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 306 (1829).

Treaties can, and on occasion do, create judicially enforceable private rights. But since such treaties are the exception, rather than the rule, there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts. *United States* v. *Emuegbunam*, 268

F.3d 377, 389-390 (6th Cir. 2001), cert. denied, 535 U.S. 977 (2002); *United States* v. *Jimenez-Nava*, 243 F.3d 192, 195-196 (5th Cir.), cert. denied, 533 U.S. 962 (2001); *United States* v. *De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001); *United States* v. *Li*, 206 F.3d 56, 61 (1st Cir.), cert. denied, 531 U.S. 956 (2000). That background principle applies even when a treaty benefits private individuals. "International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." 2 Restatement (Third) of the Foreign Relations Law of the United States (Restatement (Third) of Foreign Relations) § 907 cmt. a, at 395 (1987).

For example, in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the Court held that two conventions did not create judicially enforceable rights for ship owners, even though one specified that a merchant ship "shall be compensated for any loss or damage" in certain circumstances, and the other specified that "[a] belligerent shall indemnify the damage caused by its violation." *Id.* at 442 & n.10 (citations omitted). The Court explained that the conventions "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs." *Id.* at 442. Even though the agreements referred to "compensation" for the private party and a State's obligation to "indemnify," that language did not overcome the presumption against treaties creating privately enforceable rights: "They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Ibid.* See *Johnson* v. *Eisentrager*, 339 U.S. 769, 789 & n.14 (1950) (protections of the Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 U.N.T.S. 343, are not judicially enforceable). Like the agreements at issue in *Amerada Hess*, Article 36 may benefit a detained foreign national, but it does not give that individual a private right to challenge his conviction and sentence based on an alleged denial of consular information. See *Jimenez-*

Nava, 243 F.3d at 195-198; *Emuegbunam*, 268 F.3d at 391-394; see also *De La Pava*, 268 F.3d at 163-165; *Li*, 206 F.3d at 66-68 (Selya, J. and Boudin, C.J., concurring).

The cases petitioners cite (05-51 Pet. Br. 18-19 n. 3; 04-10566 Pet. Br. 30-31 n.11, 33-34 n.13) in which the Court has given effect to self-executing treaty provisions at the behest of private individuals are readily distinguishable from the present context. Most of those cases involve explicit treaty provisions that guarantee to individual aliens freedom to exercise such peculiarly private rights as the ability to enter into contracts, engage in commerce, or own, devise, or inherit property on the same basis as United States citizens.[1] In light of the inherently private nature of the rights at issue and the explicit language of the agreements, the courts gave effect to the self-executing treaty provisions over inconsistent state laws. See *Head Money Cases*, 112 U.S. at 598-599 (noting that courts will enforce treaty provisions that "regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property" when these "are of a nature to be enforced in a court of justice"). The affirmative obligation of the receiving State under Article 36 of the Vienna Convention to provide information to detainees—an obligation that, when respected, may still result in the sending State providing no response or assistance whatever to the detainee—is plainly of a different order from the commercial and property rights afforded by those treaties.

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[1] See, *e.g.*, *Kolovrat* v. *Oregon*, 366 U.S. 187, 191 n.6 (1961) (treaty provision guaranteeing that "[i]n all that concerns the right of acquiring * * * property, * * * Serbian subjects * * * shall enjoy the rights which the respective laws grant * * * the subjects of the most favored nation" preempted Oregon law limiting foreign nationals' right to inherit property); *Asakura* v. *Seattle*, 265 U.S. 332, 340-342 (1924) (bilateral treaty providing that "subjects of [Japan] shall have liberty" to engage in trade "upon the same terms as native citizens" of the United States preempted local ordinance precluding aliens from obtaining a business license); *Jordan* v. *Tashiro*, 278 U.S. 123, 128 (1928) (same).

In other instances, foreign nationals have been allowed to defend against criminal prosecution in light of specialty rules in extradition treaties. See, *e.g.*, *United States* v. *Rauscher*, 119 U.S. 407, 419-424 (1886); *Johnson* v. *Browne*, 205 U.S. 309, 320-321 (1907). As the Court explained in *United States* v. *Alvarez-Machain*, 504 U.S. 655 (1992), *Rauscher* and *Browne* applied the rule of specialty "because of the practice of nations with regard to extradition treaties," and "any doubt" concerning a fugitive's ability to seek judicial enforcement of the treaty-conferred rule of specialty "was put to rest by two federal statutes which imposed the doctrine of specialty upon extradition treaties to which the United States was a party." *Id.* at 660, 667. There is no similar history of enforcement of obligations such as those undertaken in Article 36 and there is no federal statute that purports to make the Article judicially enforceable.

The conclusion that individual defendants cannot rely on the Vienna Convention to attack their convictions is fully consistent with the accepted understanding that the Vienna Convention is self-executing. See S. Exec. Rep. No. 9, 91st Cong., 1st Sess. 5 (1969). The Vienna Convention is self-executing in the sense that government officials can provide foreign nationals with information about consular assistance and access to consular officers without the need for implementing legislation and can further give effect to provisions that were intended to be judicially enforced, such as those relating to consular privileges and immunities.[2] But it is a separate question

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[2] See, *e.g.*, *Risk* v. *Halvorsen*, 936 F.2d 393, 397 (9th Cir. 1991) (finding consular officer immune under Vienna Convention, art. 43(1), 21 U.S.T. at 104, 596 U.N.T.S. at 298, because duties were consular functions), cert. denied, 502 U.S. 1035 (1992); *Gerritsen* v. *de la Madrid Hurtado*, 819 F.2d 1511, 1515-1516 (9th Cir. 1987) (recognizing the enforceability of the consular immunity provision of the Convention, but finding that the criminal actions at issue did not qualify for immunity). That consular immunity can be judicially enforced is consistent with established law that formed the backdrop for the Vienna Convention. See, *e.g.*, *Davis* v. *Packard*, 32 U.S. (7 Pet.) 276, 284 (1833); *Wacker* v. *Bisson*, 348

whether Article 36 gives a foreign national an affirmative right to challenge his conviction and sentence on the ground that consular access was denied. 1 Restatement (Third) of Foreign Relations Law § 111 cmt. h, at 47 ("[w]hether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."). Such an action does not represent simple reliance on a legal protection as a defense, see 04-10566 Pet. Br. 28, but represents an affirmative use of the treaty to upset a final conviction. As discussed below, the available evidence shows that Article 36 does not confer such a right.

The question whether a private individual has a judicially enforceable right is also distinct from the question whether the United States could seek judicial relief in the event that state officials failed to provide a foreign national access to consular officers as required by the Vienna Convention. Under longstanding principles, the United States could bring an action in court to enforce compliance with a treaty obligation. See *Sanitary Dist.* v. *United States*, 266 U.S. 405, 425-426 (1925) (Holmes, J.) (United States has authority to sue "to carry out treaty obligations to a foreign power"; "The Attorney General by virtue of his office may bring [such a] proceeding and no statute is necessary to authorize the suit."). The inherent authority of the United States to bring an action stems from the constitutionally grounded primacy of the national government in the realm of foreign affairs and the need

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F.2d 602, 609 n.19 (5th Cir. 1965); *Sarelas* v. *Rocanas*, 311 F.2d 36, 38 (7th Cir. 1962), cert. denied, 373 U.S. 949 (1963); *Anderson* v. *Villela*, 210 F. Supp. 791, 792 (D. Mass. 1962); *Waltier* v. *Thomson*, 189 F. Supp. 319, 320 (S.D.N.Y. 1960). The Vienna Convention thus did not create consular immunity, but simply carried forward an established understanding. By contrast, there was no established practice that consular notice and access—like that treated in Article 36—could be individually enforced in court. Indeed, there appears to have been no practice in international law before Article 36 of a detainee being allowed to attack a criminal conviction based on any ground related to a failure of consular notification, communication, or access.

for the United States to be able to effectuate treaty obligations and speak with one voice in dealing with foreign nations. See *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413-414, 424 (2003). No similar principle confers a general right to enforce treaties on private individuals. Moreover, judicial action initiated or supported by the Executive to enforce a treaty obligation or ameliorate a breach is quite different from a recognition of judicially enforceable rights—with attendant potential complications for United States foreign policy—over the objection of the Executive.

B. The Language And Structure Of The Vienna Convention Confirm That It Does Not Create Privately Enforceable Rights

Article 36(1)(b) of the Vienna Convention specifies that "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested." 21 U.S.T. at 101, 596 U.N.T.S. at 292. In addition, "[a]ny communication addressed to the consular post by the person arrested, * * * shall also be forwarded * * * without delay." *Ibid.* Finally, "authorities [of the receiving State, *i.e.*, of the United States] shall inform the person concerned without delay of his rights under [Article 36(1)(b)]." *Ibid.*

The only violation of Article 36(1)(b) that petitioners assert is that they were not informed that they could request that their consulates be notified of their detention. Petitioners contend (05-51 Pet. Br. 21-22; 04-10566 Pet. Br. 15-16) that a violation of this obligation infringes an individual right of the detainee, which may be vindicated in court, based in large part on the fact that Article 36(1)(b) refers to the detainee's "rights." Yet, the "rights" enumerated in Article 36(1)(b) do not encompass notice to the detainee; the provision places only a *duty* on the receiving State to give notice to the

detainee about consular access. And the failure to fulfill that duty is the only violation alleged here.[3]

Even where the Convention does use the term "right," that usage does not signify an individual right that can be privately enforced through judicial process. The discussions of the International Law Commission (ILC) in drafting its proposed Article 36 (submitted by the ILC to the United Nations Conference) reflect that the proposal "related to the basic function of the consul to protect his nationals vis-à-vis the local authorities." *Summary Records of the 535th Meeting*, [1960] 1 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1960. The Article's proponent, Sir Gerald Fitzmaurice, specifically warned that "[t]o regard the question as one involving primarily human rights or the status of aliens would be to confuse the issue," *id.* at 49; rather, the procedural provisions of Article 36 "were intended to provide a consul with the means of carrying out the function of protection," *ibid.* See *ibid.* (Mr. Erim agreed "that the proposed new article * * * dealt with the rights and duties of consuls and not with the protection of human rights or the status of aliens"). Thus, although the ILC experts referred to "the right of * * * nationals of access to [the consul]," that "right" was in

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[3] Plainly, the receiving State's obligation under Article 36(1)(b) to "inform the person * * * of his rights under this sub-paragraph" refers to the "rights" addressed in the preceding two sentences: (1) to have consular officials of the sending State notified of his detention and (2) to have communications forwarded to the consular post. Neither petitioner maintains that he was affirmatively prevented from having his consul notified or otherwise communicating with his consulate. Petitioners also cite in support of their argument (05-51 Pet. Br. 23; 04-10566 Pet. Br. 15-16) paragraph (2) of Article 36, which provides that "[t]he rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State." Once again, the term "rights" in this sentence does not refer to the receiving State's duty to provide a detainee with information about consular access, which could not in any meaningful sense be "exercise[d]" by the detainee, but instead to the underlying "rights" of notification and communication.

service of the consul's ability to "carr[y] out effectively" his duties. *Ibid.* Indeed, the ILC drafters stated their view that "where a country did not carry out a provision of a convention, it would naturally be estopped from invoking that provision against other participating countries," *ibid.*, an understanding that, whether accurate or not, was clearly at odds with any supposed intent to create an enforceable individual right.

The subsequent debate between governmental delegates to the United Nations Conference convened to negotiate the Convention is to a similar effect. There was some disagreement among the delegates whether Article 36 should require mandatory notification to consular authorities or not require any affirmative step by the receiving State. 1 Official Records, United Nations Conference on Consular Relations, Vienna, 4 Mar. - 22 Apr. 1963, at 81-86, 336-340 (1963) (U.N. Official Records). Numerous delegations objected, both in the second committee session and the plenary meeting, to the burden on the receiving State of requiring notification to the consulate in all instances. *Id.* at 36-38 (Thailand, United Arab Republic (*i.e.*, Egypt), Japan, France), 82-83 (Egypt, Canada, Ceylon), 337-340 (Japan, France, Republic of Korea, Republic of Viet Nam, Thailand). Eventually, the Conference adopted a compromise offered by twenty countries, including many of those who had objected to the burden of mandatory notification. See *id.* at 82. As the Egyptian delegate explained, the mandatory notification provision was changed to provide for notification upon request of the detainee not with an intent to enshrine in the treaty an individual right, but "to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which receive many tourists and visitors," and would ensure "that the authorities of the receiving State would not be blamed if, owing to pressure or work or other circumstances,

there was a failure to report the arrest of a national to the sending State." *Ibid.*[4]

Other provisions of the Vienna Convention confirm that the Convention adheres to the traditional understanding that the agreement is intended for the benefit of the State parties, not private individuals. The Convention's preamble states that "the purpose of [the] privileges and immunities [identified in the treaty] is not to benefit individuals, but to ensure the efficient performance of functions by consular posts." 21 U.S.T. at 79, 596 U.N.T.S. at 262. Although petitioners read the preamble to refer only to provisions in the Convention that define the privileges and immunities of consular officials (05-51 Pet. Br. 32-33, 04-10566 Pet. Br. 17-19), and thus not to the "rights" in Article 36, Article 36's introductory clause itself makes clear that that provision as well was designed "[w]ith a view to *facilitating the exercise of consular functions* relating to nationals of the sending State." Vienna Convention, art. 36(1) (emphasis added). As the preamble and Article 36's introductory clause show, "the purpose of Article 36 was to protect a *state's right* to care for its nationals." *De La Pava*, 268 F.3d at 165.

Equally striking, there is no indication in the Vienna Convention that the "rights" referred to in Article 36(1)(b) may be privately enforced. To the contrary, the remedies for a violation of the "rights" referred to in Article 36(1)(b) are the traditional means by which international disputes are resolved. A foreign national's government may protest the failure to

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[4] Although the United States delegate stated in connection with the amendment that it was intended "to protect the rights of the national concerned," 1 U.N. Official Records 337 (para. 39) (statement of the United States delegate), Bustillo errs (05-51 Pet. Br. 24-27) in relying on that statement. The "rights" to which the American delegate referred were not rights created by treaty, but "rights" that existed wholly independent of the draft convention, *i.e.*, "the freedom of action of the detained persons who might not wish their consulate to be informed," such as those seeking asylum, 1 U.N. Official Records 38 (para. 21).

observe the terms of Article 36 and attempt to negotiate a solution. The governments of both Mexico and Honduras have, in fact, presented their concerns about the treatment of petitioners through diplomatic channels, and the United States has apologized for its failure to fulfill its Vienna Convention undertaking.

If traditional diplomatic channels fail to provide a satisfactory resolution, the Optional Protocol establishes a mechanism that States may choose for resolving disputes through "judicial" means. Indeed, the United States has previously sought resolution of such disputes by the ICJ, as have other States who challenged the United States' compliance with its Vienna Convention obligations. By its express terms, however, the judicial mechanism provided by the Optional Protocol is voluntary. Some sixty percent of signatories to the Vienna Convention do not subscribe to the Optional Protocol, and the United States noticed its withdrawal in March 2005. Only State parties, and not their nationals, may initiate ICJ proceedings. Moreover, even when the ICJ has jurisdiction, its ruling "has no binding force except between the parties and in respect to that particular case," Statute of the ICJ, art. 59, 59 Stat. 1062, and no individual is or can be "party" to a proceeding under the Optional Protocol. The express provision of a limited and optional international judicial forum for resolving Vienna Convention disputes further supports the conclusion that the Vienna Convention did not, *sub silentio*, create individual rights that were intended to be enforceable by private individuals in domestic criminal proceedings.

The structure of Article 36 confirms that understanding. The first protection extended is to consular officers, not to individual nationals: Article 36(1)(a) specifies that "consular officers shall be free to communicate with nationals of the sending State and to have access to them." The "rights" of foreign nationals were deliberately placed underneath, 1 U.N. Official Records 333 (Chilean delegate), signaling what the introductory clause spells out - that the function of Article

36(1)(b) is not to create freestanding individual rights but to facilitate a foreign state's right to protect its nationals. And on a practical level, a foreign national's rights are necessarily subordinate to, and derivative of, his country's rights. An individual may ask for consular assistance, but it is entirely up to the sending State whether to provide it.

Petitioners contend (05-51 Pet. Br. 23; 04-10566 Pet. Br. 16) that Article 36's reference to the detainee's "request[]" for notification of his consulate is proof that the Article was intended to confer an individual right, rather than to facilitate consular affairs. To the contrary, as noted above, see p. 18, *supra*, the Egyptian delegate explained that the move away from mandatory notice to the sending state was an attempt to reduce the burden on the receiving State. Although some delegates also expressed concern for the privacy interests of detainees who might not want their home governments to know of their detention, there was no indication that they understood the shift from mandatory notification to create a privately enforceable individual right. Notably, if a country prefers automatic notice whenever one of its nationals is detained, it may negotiate for such an agreement. In fact, the United States has bilateral agreements with some 58 States that are party to the Vienna Convention pursuant to which the governments will notify each other of a national's detention irrespective of the individual's wishes. See A553 (State Department guidance that "[i]f the alien is from a 'mandatory notification' country, notification must be given even if the alien objects"); A53 (listing 58 "Mandatory Notification Countries," including the United Kingdom, China, and Russia).[5] Under petitioners' view, the Vienna Convention, by bestowing upon individual foreign nationals a personal right to decide whether "to have his consulate notified or not" (05-51 Pet. Br.

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[5] All citations to "A___" are to the Annexes to the Counter-Memorial of the United States in *Avena*. The United States proposes to lodge the Counter-Memorial and Annexes with the Court, if the Court so desires.

23; 04-10566 Pet. Br. 16), would supersede any previous agreement that was inconsistent with such an individual right. See *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (per curiam) (noting later-in-time rule). Yet the United States continues to recognize and enforce mandatory notification agreements that were entered into before the Vienna Convention. See A581 (recognizing continuing effect of agreements with the United Kingdom and U.S.S.R. that entered into force before the Vienna Convention became effective for the United States).

C. The Vienna Convention's Ratification History And Its Construction By The Executive Branch Confirm That It Was Not Understood To Have The Radical Effect Of Creating Individual Rights

The ratification history provides further evidence that Article 36 does not create private rights that may be enforced in a criminal proceeding in the domestic courts of the United States. See *United States* v. *Stuart*, 489 U.S. 353, 366 (1989) (ratification history is relevant in interpreting treaty); *id.* at 373 (Scalia, J., concurring) (accepting resort to extratextual sources "when a treaty provision is ambiguous"). At the time of ratification, the State Department informed the Senate that "[t]he Vienna Consular Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions." S. Exec. Rep. No. 9, *supra*, at 18. The Senate Foreign Relations Committee, in turn, cited as a factor in its endorsement of the treaty that "[t]he Convention does not change or affect present U.S. laws or practice." *Id.* at 2. And, following ratification, the State Department wrote a letter to all 50 governors explaining it would not require "significant departures from the existing practice within the several states of the United States." *Li*, 206 F.3d at 64. That series of statements could not have been made if the Convention were understood to give a criminal defendant a private right to challenge his conviction and sen-

tence on the ground that he was not informed as required by Article 36. See Letter from David R. Andrews, Legal Adviser, Department of State, to James K. Robinson, Assistant Attorney General, Criminal Division, U.S. Department of Justice, Re: *United States* v. *Li*, No. 97-2034 (1st Cir.) (Oct. 15, 1999) (*Li* Letter); *id.* Attach. A, Department of State Answers to the Questions Posed by the First Circuit in *United States* v. *Nai Fook Li* at A9 (State Department Answers).[6]

Of particular significance is the fact that the Executive Branch does not view the Vienna Convention as creating a right for a criminal defendant to challenge his conviction. The Executive Branch's interpretation of an international treaty "is entitled to great weight." *Stuart*, 489 U.S. at 369 (quoting *Sumitomo Shojo Am., Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982)). The Executive Branch has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right to challenge his conviction and sentence. The United States advised the Court of that interpretation in its brief (at 18-23) in *Breard* v. *Greene*, 523 U.S. 371 (1998) (per curiam) (No. 97-8214), and the State Department's Answers to the First Circuit's questions in *Li* confirmed that the State Department had consistently taken that position since the first time the issue was raised by foreign governments in the early 1990s. State Department Answers at A1. Most recently, that view was reiterated in the Brief for the United States in *Medellin* v. *Dretke*, 125 S. Ct. 2088 (2005) (per curiam) (No. 04-5928).

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[6] The State Department Answers and the *Li* Letter are reprinted in Consular and Judicial Assistance and Related Issues: Consular Notification and U.S. Criminal Prosecution: *United States* v. *Nai Fook Li* and *United States* v. *Lombera-Camorlinga*, *2000 Digest* chap. 2(A)(1), at 25-43 and is also available at <*http://www.state.gov/documents/organization/7111.doc*>.

D. The Implementation Of Article 36, Both In The United States And Abroad, Belies An Individual-Rights Interpretation

The ratification history and the State Department's interpretation accord with both the United States' own practice in enforcing the Vienna Convention and the practice of other parties to the Convention. See *Stuart*, 489 U.S. at 366 ("subsequent operation" of treaty is relevant in interpreting it). As the Vienna Convention on the Law of Treaties reflects, treaties should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context." Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340.[7] "[T]ogether with the context," treaty interpretation must take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." *Id.*, art. 31(3)(b), 1155 U.N.T.S. at 340.

The State Department's longstanding practice has been to investigate a country's complaint about the absence of notification. When a violation has been confirmed, the Department has extended a formal apology to that country's government and sought to prevent a recurrence through educational efforts. State Department Answers A3. It is the Department's understanding that "this is how consular notification issues have always been handled by the United States under all of the consular conventions to which it is a party, and in situations governed by customary international law." *Id.* at A2-A3. In cases involving the death penalty (and in one other context), the Department has also requested that the violation be

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[7] Although the United States has not ratified the Vienna Convention on the Law of Treaties, the United States generally recognizes the Convention as a valuable guide to principles of treaty interpretation. See, *e.g.*, *Fujitsu Ltd.* v. *Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir.), cert. denied, 534 U.S. 891 (2001).

considered in clemency.[8] Likewise, in cases of American citizens detained abroad, United States consular officers "raise[] concerns about failures of consular notification through diplomatic channels or directly with the law enforcement officials concerned." *Id.* at A2. Thus, although the State Department "sets a very high standard of assistance" for American citizens detained abroad and aggressively addresses matters of Article 36 compliance, United States consular officers "do not seek judicial remedies for failures of consular notification" in the host country's criminal justice system, and the Department is "unaware of any instance in which the United States has asked a foreign court to undo a criminal proceeding based on a failure of consular notification." *Id.* at A5.

The State Department's experience abroad has been that foreign governments also usually address complaints about the failure of notification by investigating and extending apologies where appropriate. State Department Answers at A3.

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[8] The United States has also taken substantial measures to implement the Vienna Convention obligation to advise detained foreign nationals that they may contact their consuls. The State Department publishes and has placed on a public website <http://travel.state.gov/law/consular/consular_636.html>, "Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them," including 24-hour contact telephone numbers that law enforcement personnel can use to obtain advice and assistance. The Department also publishes the "Instructions" as a Consular Notification and Access Manual, publishes a Consular Notification Pocket Card for police pocket use that has suggested advisories for complying with the Vienna Convention and other consular conventions, publishes a 2-foot by 3-foot wall poster that police can post in their facilities containing the consular notification advisory in many languages (Arabic, Chinese, Cambodian, Creole, English, Farsi, French, German, Italian, Japanese, Korean, Lao, Polish, Portuguese, Russian, Spanish, Thai, and Vietnamese) <http://travel.state.gov/law/info/info_626.html>, and makes a training video available. The State Department regularly communicates with the States and law enforcement authorities about ensuring compliance with the consular notification requirements of the Convention.

As of 1999, the Department was not aware of any foreign country that had remedied failures of notification through the criminal justice process. *Id.* at A1, A8. While the Convention has been in force for more than four decades, surveys of foreign decisions have uncovered only a handful of decisions that even touch on the issue, even though 161 countries are now parties to the Vienna Convention. None of these cases has unambiguously endorsed a judicially enforceable individual right to attack a conviction.[9] Notably, briefs amici curiae have

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[9] Petitioners do not cite a single instance in which they contend that a foreign state has afforded recognition of an individual right under Article 36(1)(b) in the context of a criminal prosecution. Bustillo cites no example at all of foreign courts applying Article 36, and Sanchez-Llamas cites (04-10566 Pet. Br. 28) only *Khadr* v. *Canada (Minister of Foreign Affairs)* [2005] 2 F.C.R. D-25 (Can. Fed. Ct. 2004), a case in which a Canadian national detained at Guantanamo Bay sought to compel Canada to provide consular assistance based upon Canada's purported promise of such assistance in a guide published for Canadians abroad.

Neither do the foreign cases cited by petitioners' amici indicate a foreign practice of giving judicial recognition to individual rights under the Vienna Convention in the context of criminal prosecutions. See Former U.S. Diplomats Amici Br. 20-21 (citing a German case, Judgment of 7 Nov. 2001, BGHSt 5, 116 (A1956), which rejected a motion to exclude on the ground that the Vienna Convention conferred no privileges beyond those accorded to Germans, and a Canadian case, *R.* v. *Partak*, 2001 C.C.C. Lexis 312 (Ont. Super. Ct. of J. Oct. 31, 2001) (A1964), which seems only to have assumed the existence of a judicially cognizable right and declined to suppress statements); Nat'l Ass'n of Crim. Def. Lawyers (NACDL) Amici Br. 21-22 (citing *R.* v. *Van Axel*, (Snaresbrook Crown Ct. May 31, 1991) (A2006) and *R.* v. *Bassil*, (Acton Crown Ct. July 28, 1990) (A2008), in which the same British trial judge noted the lack of consular notification, but appears to have suppressed confessions based on the way in which consular notification requirements were incorporated into domestic British statutory law and the fact that the defendants, who spoke little English and were held incommunicado, might not to have understood their rights); NACDL Amici Br. at 19-20 & n.18 (citing three Australian decisions, *R.* v. *Tan* [2001] WASC 275 (W. Austl. Sup. Ct.) (unreported); *R.* v. *Su* [1997] 1 V.R. 1 (Sup. Ct. Vict.); and *Tan Seng Kiah* v. *R.* [2001] 10 NTLR 128 (N. Terr. Ct. Crim. App.), all of which discussed suppression of confessions as a matter

been filed in these cases on behalf of 36 nations that are parties to the Vienna Convention. *None* of those countries identifies a single instance in which their courts have recognized a judicially enforceable individual right under the Vienna Convention. State practice thus shows a glaring absence of private judicial remedies in criminal cases for failures of consular notification.

Finally, the government's interpretation of the Vienna Convention is consistent with how the United States has interpreted similar language found in other treaties. For example, the International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention), *opened for signature* Jan. 10, 2000, S. Treaty Doc. No. 49, 106th Cong., 2d Sess. (2000), 2178 U.N.T.S. 229, and the International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention), *opened for signature* Jan. 12, 1998, S. Treaty Doc. No. 6, 106th Cong., 1st Sess. (1999), 2149 U.N.T.S. 284, provide:

> 3. Any person [detained in connection with terrorist financing] shall be entitled to: (a) Communicate without delay with the nearest appropriate representative of [his] State * * * ; (b) Be visited by a representative of that

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of the courts' discretion to exclude evidence based on public policy concerns on account of interrogators' violation of numerous domestic statutes, including a requirement to inform the suspect of his right to an attorney as well as to contact his consulate, *i.e.*, facts under which United States courts would also have excluded the statements pursuant to *Miranda*). Other foreign decisions from the same countries, not cited by petitioners, expressly hold that the Vienna Convention does not confer individual rights. See *Canada* v. *Van Bergen* [2000] 261 A.R. 387, 390 (2000) (A1982, A1986) ("The Vienna Convention creates an obligation between states and is not one owed to the national."); *R.* v. *Abbrederis* (1981) 1 N.S.W.L.R. 530, 543 (Ct. of Crim. App.) (Australia) (A1987, A1995) (Article 36 "is dealing with freedom of communication between consuls and their nationals. It says nothing touching upon the ordinary process of an investigation by way of interrogation.").

> State; (c) Be informed of *that person's rights* under subparagraphs (a) and (b).
>
> 4. The *rights* referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory in which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

Terrorist Financing Convention, art. 9, paras. 3 and 4, S. Treaty Doc. No. 49, *supra*, at 7-8, 2178 U.N.T.S. at 234 (emphasis added); see also Terrorist Bombings Convention, art. 7 paras. 3 and 4, S. Treaty Doc. No. 6, *supra*, at 7-8, 2149 U.N.T.S. at 287-288. In its transmittal package, the Executive Branch explained that this language "like the Convention as a whole as well as other similar counterterrorism conventions, is not intended to create individual rights of action." S. Treaty Doc. No. 49, *supra*, at X.

E. The International Court of Justice's Decisions Construing The Convention Do Not Overcome The Conclusions Compelled By Principles Of Treaty Interpretation, The Language And Purpose Of The Convention, And Its Implementation History

The principle that the Court should give "respectful consideration" to an international court's interpretation of a treaty, *Breard*, 523 U.S. at 375, does not lead to the conclusion that Article 36 affords an individual a right to challenge his conviction and sentence. Petitioners and their amici rely principally upon two decisions of the ICJ, in *Avena* and the *LaGrand Case* (*Germany v. United States*), 2001 I.C.J. 466 (*Lagrand*) (June 27). In *LaGrand*, the ICJ concluded that "Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in

this Court by the national State of the detained person." *LaGrand*, 2001 I.C.J. para. 77, at 494. That passage does not state that Article 36 gives a foreign national a domestically enforceable private right. Instead, consistent with the position stated in this brief, it states only that, when there has been a denial of a foreign national's Article 36 rights, a State may seek relief from the ICJ if the dispute is subject to that body's jurisdiction.

LaGrand also concluded that, because the United States failed to inform the LaGrand brothers of their rights as required by Article 36(1), its later application of a procedural default rule to refuse to consider their claim of prejudice arising from that breach violated Article 36(2)'s requirement that the laws of the receiving State must enable "full effect to be given to the purposes for which the rights accorded under this article are intended." 2001 I.C.J. para. 91, at 497-498. That conclusion presupposes that either Article 36(1)'s reference to "rights" or Article 36(2)'s "full effect" requirement, or the two together, create an obligation for criminal courts to attach "legal significance" to a violation of Article 36(1) in a criminal proceeding even in the face of contrary domestic-law principles of default. See *ibid.*; *Avena*, 2004 I.C.J. para. 113, at 57. That understanding, however, is inconsistent with the language and structure of Article 36 of the Vienna Convention in its context as well as the understanding and implementation of the parties to the Convention.

While the ICJ's understanding of the Convention's requirements is entitled to respectful consideration, the ICJ does not exercise any judicial power of the United States, and it is ultimately the responsibility of this Court to interpret the Vienna Convention as a matter of federal law. See *Williams* v. *Taylor*, 529 U.S. 362, 378-379 (2000); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 58-59 (1982). The United States is obligated under international law to comply with the judgment of the ICJ in any case to which it is a party and the President has taken unprecedented ac-

tion, pursuant to his constitutional and statutory authority, see p. 44 & n. 17, *infra*, to ensure compliance with the ICJ's judgment in *Avena* by determining that the convictions and sentence of the 51 Mexican nationals covered by that judgment receive review and reconsideration. The United States has no obligation to accept the reasoning underlying the ICJ's judgments, however, or to apply that reasoning in other cases. As we have demonstrated, the ICJ's reasoning is inconsistent with principles of treaty construction, including the need to construe treaty terms "in their context," "together with * * * [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Vienna Convention on the Law of Treaties, art. 31(1), (3)(b), 1155 U.N.T.S. at 340. Moreover, the weight to be given an ICJ judgment is at its nadir where, as here, the Executive Branch, whose views on treaty interpretation are entitled to at least "great weight," has considered the ICJ's decisions and determined that its own longstanding interpretation of the treaty is the correct one. Notably, the withdrawal of the United States from the Optional Protocol will ensure that the United States incurs no further international legal obligations to review and reconsider convictions and sentences in light of violations of Article 36 based on the ICJ's interpretation of the Convention. Under these circumstances and in light of the considerations discussed above, this Court should conclude that Article 36 does not give criminal defendant a private right to challenge his conviction and sentence on the ground that Article 36 was breached.[10]

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[10] Although Sanchez-Llamas relies on a "presumption in favor of uniform treaty interpretation," 04-10566 Pet. Br. 28, as a basis for this Court to adopt the ICJ's reasoning in *Avena*, what is notable is the stark *absence* of other countries affording the kind of judicial remedy Sanchez-Llamas seeks. See pp. 26-27, *supra*.

II. THE SUPPRESSION OF EVIDENCE IS NOT AN AVAILABLE REMEDY FOR A VIOLATION OF ARTICLE 36'S CONSULAR NOTIFICATION PROVISION

If the Court confirms the Executive Branch's longstanding interpretation of the Vienna Convention as not creating judicially enforceable rights, its decision need go no further. However, even assuming *arguendo* that Article 36(1)(b) does confer individual rights on foreign national detainees, the violation of those rights would not warrant suppression of statements made by a detainee who was not informed about his right to contact his consular officials. Nothing in the treaty even remotely suggests that such a remedy is required, and this Court has no supervisory authority to impose an exclusionary rule remedy on the States.

A. The Court's Authority To Impose Exclusionary Rules On The States Is Highly Circumscribed

As this Court has recognized, exclusionary rules "impose[] significant costs" by "preclud[ing] consideration of reliable, probative evidence," which both "undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions." *Pennsylvania Bd. Of Probation & Parole* v. *Scott*, 524 U.S. 357, 364 (1998). Because of the high social costs of exclusionary rules, the Court has admonished that suppression should be "restricted to those areas where its remedial objectives are most efficaciously served," and that an "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *United States* v. *Payner*, 447 U.S. 727, 736 (1980) (internal quotation marks omitted).

The Court has fashioned and applied exclusionary rules to state criminal proceedings to protect federal *constitutional* rights. *Dickerson* v. *United States*, 530 U.S. 428, 444 (2000) (explaining application of *Miranda* to state courts on ground

that "*Miranda* announced a constitutional rule" based in the Fifth Amendment); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (exclusionary rule for evidence obtained in violation of the Fourth Amendment). *Payne* v. *Arkansas*, 356 U.S. 560, 568 (1958) (exclusionary rule for involuntary confessions under due process principles). These constitutionally based rules of suppression apply equally to proceedings in state court as to those in federal court. See *Dickerson*, 530 U.S. at 438.

In addition, the Court requires the exclusion of evidence when Congress itself has mandated suppression as the remedy for a statutory violation. See *United States* v. *Giordano*, 416 U.S. 505, 526-527 (1974) (requiring exclusion under 18 U.S.C. 2515). If the statute so provides, the rule would also bind the States under the Supremacy Clause. See, *e.g.*, 18 U.S.C. 2515 (no intercepted communication "may be received in evidence in any trial * * * before any court * * * of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter"). The Court has made clear however, that, as a general matter, non-constitutional violations do not warrant the suppression of evidence. See *United States* v. *Caceres*, 440 U.S. 741, 754-755 (1979) (because agent's violation of agency regulations did not contravene the defendant's constitutional rights in any respect, "our precedents enforcing the exclusionary rule to deter constitutional violations provide no support for the rule's application in this case").[11] And the Court

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[11] Consistent with this Court's constitution-based approach to the exclusionary rule, the courts of appeal have repeatedly declined to order the suppression of evidence as a remedy for a violation of a federal statute or regulation that does not implicate constitutional rights, in the absence of a convincing showing that such a remedy was intended by Congress. See, *e.g.*, *United States* v. *Ware*, 161 F.3d 414, 424 (6th Cir. 1998) ("[s]tatutory violations, absent underlying constitutional violations or rights, are generally insufficient to justify imposition of the exclusionary rule"), cert. denied, 526 U.S. 1045 (1999); *United States* v. *Ani*, 138 F.3d 390, 392-393 (9th Cir. 1998) (violation of regulation governing opening of international letter mail should not be remedied through

recently emphasized that "[i]t is beyond dispute that [this Court] do[es] not hold a supervisory power over the courts of the several States." *Dickerson*, 530 U.S. at 438.

Sanchez-Llamas contends (04-10566 Pet. Br. 37) that the Court possesses the inherent power to suppress evidence "where the integrity of the criminal proceeding was jeopardized," which, he asserts, justifies the Court in fashioning a suppression remedy here. But the cases he cites do not support a broad power for the Court to create and impose on the States an exclusionary rule for Vienna Convention violations when no such rule is expressed in the treaty's text. See 04-10566 Pet. Br. 37-38 (discussing *Miller* v. *United States*, 357 U.S. 301, 313 (1958), *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957)).

In *Miller*, federal agents made a warrantless entry of a home to effect an arrest without knocking and announcing their presence. While no federal statute governed that action, the government conceded that the entry should be judged by the standards set out in the statute governing entries to execute a search warrant, 18 U.S.C. 3109. Because solely a federal prosecution was involved, and because Section 3109 does not itself provide for the exclusion of evidence, the Court's exclusion of evidence in that case is best understood as an exercise of supervisory power over the federal courts. *Miller*

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suppression); *United States* v. *Mason*, 52 F.3d 1286, 1289 n. 5 (4th Cir. 1995) (fact that Customs Service agent was not statutorily authorized to conduct search did "not rise to the level of a constitutional violation warranting suppression of the evidence"); *United States* v. *Benevento*, 836 F.2d 60, 69-70 (2d Cir. 1987) (violation of 31 U.S.C. 5317(b), requiring Customs agent to have reasonable suspicion to search luggage at port of entry for currency, did not warrant suppression), cert. denied, 486 U.S. 1043 (1988) (overruled on other grounds, *United States* v. *Indelicato*, 865 F.2d 1370 (2d Cir. 1989), cert. denied, 493 U.S. 811 (1989)); *United States* v. *Hensel*, 699 F.2d 18, 29-30 (1st Cir.) (Breyer, J.) (violation of regulation, statute, and rule of international law prohibiting search of foreign flag vessel without consent of flag state did not warrant suppression), cert. denied, 461 U.S. 958 and 464 U.S. 823 and 824 (1983).

therefore stands as no authority for the Court to create an exclusionary rule that is binding on the States.[12]

Similarly, as Sanchez-Llamas acknowledges (04-10566 Pet. Br. 39), the *McNabb-Mallory* line of cases, under which the Court excluded statements made by a suspect who was not presented to a magistrate promptly after his arrest, was adopted "[i]n the exercise of [the Court's] supervisory authority over the administration of criminal justice in the federal courts." *McNabb*, 318 U.S. at 341. That rule therefore does not—indeed, cannot—apply to state criminal proceedings. See *Dickerson*, 530 U.S. at 438; cf. *United States* v. *Alvarez-Sanchez*, 511 U.S. 350 (1994) (holding that 18 U.S.C. 3501(c), by which Congress modified, and perhaps repudiated, the *McNabb-Mallory* line of cases, is "not triggered" "[a]s long as a person is arrested and held only on state charges by state or local authorities"). Plainly, then, Sanchez-Llamas is incorrect when he relies on the "*Miller* and the *McNabb-Mallory* line of cases" to support the conclusion that "suppression is the appropriate remedy for an Article 36 violation" in state criminal proceedings. 04-10566 Pet. Br. 41.[13]

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[12] To the extent that violations of knock-and-announce principles may support the exclusion of evidence in state courts, cf. *Hudson* v. *Michigan*, cert. granted, 125 S. Ct. 2964 (2004) (No. 04-1360), it is because the "principle of announcement" "is an element of the reasonableness inquiry under the Fourth Amendment." *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995).

[13] Moreover, even in a federal criminal proceeding, the imposition, over the objection of the Executive Branch, of a remedy not expressly provided in the text of a treaty but designed to enforce the treaty would be a peculiarly inappropriate use of the judiciary's supervisory powers. The Executive Branch has the primary responsibility for ensuring compliance with the VCCR and is in the best position to assess what steps are appropriate to promote compliance and ensure reciprocal treatment of United States citizens abroad. Just as the supervisory authority of the courts must yield to a contrary congressional enactment in the domestic context, *Dickerson*, 530 U.S. at 437, the supervisory power would be inappropriate in light of a contrary executive branch determination concerning the steps necessary to ensure compliance with a treaty.

B. There Is No Basis For Construing The Vienna Convention As Incorporating An Implied Suppression Remedy

Because the Court cannot impose an exclusionary rule on the States as a matter of its supervisory authority, *Dickerson*, 530 U.S. at 438, the only basis for this Court to require suppression of petitioner's constitutionally-obtained statements in his state court criminal trial would be a finding that the Vienna Convention itself requires suppression. But it would be strange to attribute to the drafters of the Vienna Convention an intention to adopt a global exclusionary rule to apply whenever a receiving State failed to give the information required in Article 36(1)(b). Courts of other nations rarely excluded evidence (apart from involuntary confessions) from their criminal trials as a sanction for police conduct. See *Roper* v. *Simmons*, 125 S. Ct. 1183, 1226-1227 (2005) (Scalia, J., dissenting). Even in the United States, the exclusion of *voluntary* confessions because of the absence of constitutionally-based warnings was yet three years in the future at the time that the Vienna Convention was drafted in 1963. An exclusionary sanction for breach of a notification requirement would thus have been very novel indeed for an international conference of treaty negotiators. "There is no reason to think the drafters of the Vienna Convention had these uniquely American rights [to suppression of unwarned statements] in mind, especially given the fact that even the United States Supreme Court did not require Fifth and Sixth Amendment post-arrest warnings until it decided *Miranda* in 1966, three years after the treaty was drafted." *United States* v. *Lombera-Camorlinga*, 206 F.3d 882, 886 (9th Cir.) (en banc), cert. denied, 531 U.S. 991 (2000). See Craig M. Bradley, *Mapp Goes Abroad*, 52 Case W. Res. L. Rev. 375 (2001) (noting several countries that have adopted *Miranda*-type suppression rules only very recently); J. B. Dawson, *The Exclusion of Unlawfully Obtained Evidence: A Comparative Study*, 31 Int'l Comp. L.Q. 513, 534-535 (1982) (noting that exclusion

of voluntary statements on the basis of a right against self-incrimination was not recognized in England until 1979).[14]

1. Neither the text nor structure of the Convention suggests that the drafters intended suppression of evidence as a remedy for violations of Article 36(1)

"[T]he Vienna Convention itself prescribes no judicial remedy or other recourse for its violation." *United States* v. *Ademaj*, 170 F.3d 58, 67 (1st Cir.), cert. denied, 528 U.S. 887 (1999). There is nothing in the text of Article 36(1)(b) that suggests a suppression remedy. Indeed, there is no reference at all in Article 36(1)(b) to the collection or introduction of evidence. Thus, petitioner's argument is only that Article 36(1)(b) somehow implies a suppression remedy. As noted, international law rarely specifies private remedies, particularly not at the level of detail presumed by petitioner. See 2 Restatement (Third) of Foreign Relations pt. IX, introductory note at 339 ("Many obligations under international law benefit private persons * * * but the principal remedies for violation of these obligations are interstate only; international private remedies for violations of international law are still rare.").

Notably, the ICJ's decision in *Avena* did not purport to identify a specific remedy beyond review and reconsideration that the United States was required to afford, even under the ICJ's individual-rights-creating view of Article 36. The ICJ thus stated that it was "not to be presumed * * * that partial or total annulment of conviction or sentence provides the

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[14] The courts of appeals that have addressed the issue have uniformly concluded that suppression of evidence is not an appropriate remedy for a violation of any individual rights that may be created by Article 36. See, *e.g.*, *United States* v. *Minjares-Alvarez*, 264 F.3d 980, 986-987 (10th Cir. 2001); *Jimenez-Nava*, 243 F.3d at 198-200; *United States* v. *Page*, 232 F.3d 536, 540 (6th Cir. 2000), cert. denied, 532 U.S. 935, 1023, and 1056 (2001); *United States* v. *Chaparro-Alcantara*, 226 F.3d 616, 621-622 (7th Cir. 2000), cert. denied, 531 U.S. 1026 (2001); *United States* v. *Lombera-Camorlinga*, 206 F.3d at 885; *Li*, 206 F.3d at 61.

necessary or sole remedy" for the Article 36 violations that it found. *Avena*, 2004 I.C.J. para. 123 at 60. Indeed, the ICJ specifically cautioned that its decision did not, as Mexico unsuccessfully urged, mandate imposition of the domestic exclusionary rule in the case of Article 36 violations. *Id.* para. 127, at 61.

Sanchez-Llamas's contention that an exclusionary rule is implicit in the Vienna Convention requires a number of unwarranted inferential leaps. Most significantly, his contention (04-10566 Pet. Br. 45) that Article 36 "safeguard[s] a foreign national's privilege against self-incrimination" rests implicitly on the view that there is some nexus between a foreign detainee's invocation of his right to contact his consulate and a right to avoid self-incrimination or police interrogation. But there is no such connection. Indeed, it is highly unlikely that the Convention's drafters would have been attuned to self-incrimination concerns, since "[t]here is nothing comparable to the Fifth Amendment privilege in any supranational prohibition against compelled self-incrimination derived from any source, the privilege being 'at best an emerging principle of international law.'" *United States* v. *Balsys*, 524 U.S. 666, 695 n.16 (1998) (quoting Diane M. Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. Rev. 1201, 1259 (1998)). And *Miranda* provides no analogy here. *Miranda* protects the right against self-incrimination by prohibiting introduction of statements resulting from custodial interrogation when a suspect has not been warned of his right against self-incrimination. *Dickerson*, 530 U.S. at 435. The Vienna Convention contains no such prohibition—it provides a right to consular notification, not a right against self-incrimination or to be free from interrogation. See *Lombera-Camorlinga*, 206 F.3d at 886 ("the treaty does not link the required consular notification in any way to the commencement of police interrogation" or "to cease interrogation once the arrestee invokes his right" to have his consulate notified); *United States* v. *Ortiz*, 315

F.3d 873, 887 (8th Cir. 2002) ("the Vienna Convention does not require that interrogation cease until consular contact is made"), cert. denied, 538 U.S. 1042 (2003) and 540 U.S. 1073 (2003); *Jimenez-Nava*, 243 F.3d at 199 (same). Nor can such a requirement be read into the agreement because, unlike *Miranda*, a foreign national has no right to insist that his consulate provide him with any assistance whatsoever. That is entirely within the discretion of the sending State.

The fact that the sending State is under no obligation to provide assistance would, in most cases, make entirely speculative any determination whether the defendant had been prejudiced by his lack of awareness about Article 36. Any attempt to muster concrete evidence would create its own problems. Detainees would presumably need to obtain testimony or other evidence from the sending State's consular officers and employees to prove their claims, yet those officials are immune from the court's jurisdiction, Vienna Convention, art. 43, 21 U.S.T. at 104, 596 U.N.T.S. at 298, and "under no obligation to give evidence concerning matters connected with the exercise of their function," Vienna Convention, art. 44(3), 21 U.S.T. at 105, 596 U.N.T.S. at 298. Finally, even if the officials agreed to provide testimony, any judicial inquiry might easily embroil the courts in making rulings that could embarrass foreign governments (by concluding, for example, that testifying consular officers were not credible or that the consular post would not have provided meaningful consular assistance to its nationals). Thus, the remedy proposed by petitioner would end up undermining, rather than furthering, the central purpose of the Convention, "the promotion of friendly relations among nations." Vienna Convention, 21 U.S.T. at 79, 596 U.N.T.S. at 262; see *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968) (recognizing danger inherent in statutory scheme that "seems to make unavoidable judicial criticism" of some nations).

2. *A suppression remedy would be inconsistent with the implementation practices of the State parties to the Convention*

Any suggestion that interrogation of a foreign national must stop until the consulate has been notified and made a determination whether to provide assistance (and, if so, to make arrangements for assistance to be provided) is wholly inconsistent with the practice of the States that are parties to the treaty, including approved practices in the United States. See, *e.g.*, Vienna Convention of the Law of Treaties, art. 31(3)(b), 1155 U.N.T.S. at 340 (emphasizing importance of "subsequent practice in the application of the treaty" in interpreting a treaty's meaning). The State Department, for example, informs police that foreign nationals should be "advised of the possibility of consular notification by the time the foreign national is booked for detention," U.S. Dep't of State, Consular Notification and Access 20 (A552), which may, of course, happen after interrogation of the foreign national has given police a basis for making a charge, and the State Department indicates that notice to the consulate, if requested, would "normally * * * have been made within 24 hours, and certainly within 72 hours" of the request, *ibid.*, by which time interrogation will be completed in many, if not most, cases. Such guidelines provide far more time for notification of consular officials than would be allowed if such notification were intended to ensure consular assistance could be provided before the detainee made a knowing decision whether to cooperate in police interrogation. See *id.* at 47-49 (A579-A581) (bilateral mandatory notification agreements recognizing that notice to the consulate could take a matter of days).

The practice of other signatory nations makes the disconnect between consular notification and limitations on interrogation even more obvious. The idea that the receiving State's failure to inform a foreign national of his ability to seek consular assistance would lead to the exclusion of the national's

statements from trial would have come as a considerable surprise to many of the participants at the diplomatic conference, whose criminal justice systems were (and are) quite different from our own. For example, several parties to the Vienna Convention do not permit access to foreign detainees by their consular officials during the initial period of interrogation. According to the Declaration of Assistant Secretary of State Harty, submitted in the *Avena* matter, "France does not permit U.S. consular officials to have access to U.S. citizen detainees while they are in police custody." Harty Decl. 9 (A385). Similarly, several countries "do not permit consular access until at least initial questioning is completed" (China, Italy, Panama), or, in other cases, during an initial period of "incommunicado detention" (Argentina, Belgium, and Spain). *Id.* at 9-10 (A385-A386). Indeed, in many of these countries "suspects can be held by the police for substantial periods of time without having access even to legal counsel." Prof. Thomas Weigend Decl. in *Avena* 3 (A363) (citing Argentina, China, France, and Japan). See also *id.* at 5 (A365) (noting that suppression of reliable, voluntary statements as a form of retaliation for violating procedural rules "does not * * * comport with legal systems operating under * * * the 'inquisitorial' mode of fact-finding" in which "it is the court's responsibility to find the truth regardless of the activity or passivity of the prosecution and the defense").

3. The Senate did not intend for the Court to adopt a suppression remedy for Vienna Convention violations

In view of Congress's response to *Miranda* and other decisions of this Court authorizing the exclusion of voluntary confessions in circumstances with a clear nexus between the right and the remedy, it is virtually inconceivable that the Senate would have given its advice and consent to the Vienna Convention if it had understood that a breach of the consular-notification requirement would result in the exclusion of voluntary confessions. Two years after the *Miranda* decision—

and just one year before giving its advice and consent to the ratification of the Vienna Convention—Congress enacted 18 U.S.C. 3501, which was intended to overrule *Miranda* and restore a pure voluntariness standard for the admissibility of confessions in federal court. *Dickerson*, 530 U.S. at 435-436. Notably, the Senate Report on Section 3501 was also particularly critical of the exclusionary rule adopted in *Mallory*, which Sanchez-Llamas cites (04-10566 Pet. Br. 37-38) as an example of the Court's inherent authority to append an exclusionary rule to a federal statute, but which the Senate sought to "abrogat[e]." S. Rep. No. 1097, 90th Cong., 2d Sess. 40 (1968). See *id.* at 38 (citing "need[] to offset the harmful effects of the *Mallory* case").

In place of *Miranda* and *Mallory*, Congress prescribed a test that made voluntariness the linchpin of admissibility, after consideration of the totality of the circumstances, with the specific goal of avoiding inflexible rules. See 18 U.S.C. 3501(a).[15] It can hardly be believed that the Senate, only a year later, voted without any comment to establish a different inflexible rule that would exclude an otherwise voluntary confession in the context of an underlying "right" to consular notification, not a right to be free of involuntary self-incrimination. It is more likely that the Senate would have intended that a foreign national's "lack [of] a basic understanding of the American legal system" and "[in]ability to communicate in English" (N.Y.C. Bar Ass'n Amicus Br. 17) would be factors in answering the more fundamental question whether his statement was voluntary.

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[15] This Court held in *Dickerson* that Section 3501(a) could not displace *Miranda*'s constitutionally based rule. That holding does not undercut the relevance of Section 3501 in assessing the Senate's likely understanding that Article 36 would not threaten the admissibility of voluntary confessions in federal and state prosecutions or the validity of Section 3501 in overriding the supervisory rule adopted in *Mallory*.

III. THE VIENNA CONVENTION DOES NOT PRECLUDE APPLICATION OF PROCEDURAL DEFAULT PRINCIPLES

Even if Article 36 did create individually enforceable rights, and even if those rights were enforceable in the context of the national's criminal trial, the Convention would still not preclude Virginia from applying its procedural default rules to Bustillo's Vienna Convention claim. Virginia's long-established rule that a defendant's failure to raise a claim at trial or on direct review bars the defendant from presenting the claim on collateral review is an adequate and independent ground that will support a state habeas court's judgment. See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Because, "[i]n the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional," this Court "has no power to review a state law determination that is sufficient to support the judgment." See *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). Bustillo's sole argument in this Court for avoiding Virginia's procedural bar rule is that the Vienna Convention precludes application of that doctrine to his Article 36 claim. That argument lacks merit.

A. This Court's Decision In *Breard* Is Controlling And Should Not Be Overturned

This Court, in fact, already considered and resolved that issue of treaty interpretation in *Breard*, in which, as here, the defendant failed to raise a Vienna Convention claim at trial or on appeal. The Court rejected as "plainly incorrect" the notion that the Vienna Convention "trumps the procedural default doctrine," and held, to the contrary, that the procedural rules of the forum State, including rules on procedural default, govern implementation of the Vienna Convention. *Breard*, 523 U.S. at 375. As the Court noted, "although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply." *Id.*

at 376. Moreover, while acknowledging both a preliminary ICJ order related to the defendant and the principle that courts in the United States should give "respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret [it]," the Court indicated in *Breard* that such "respectful consideration" was conditioned by the background international law principle that, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* at 375.[16]

As the Court has noted, that background principle "is embodied in the Vienna Convention itself," *Breard*, 523 U.S. at 375, as Article 36(2) expressly provides that Article 36 rights "shall be exercised in conformity with the laws and regulations of the receiving State," *ibid.* (quoting Vienna Convention, art. 36(2)). Because "[i]t is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas," this Court concluded that Article 36(2) reinforced, rather than defeated, the principle that domestic procedural default rules apply with regard to forfeited Vienna Convention claims. *Ibid.* Accordingly, the Court in *Breard* held that, having "failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia," Breard "cannot raise a claim of violation of those rights now on habeas review." *Id.* at 375-376.

Petitioner urges the Court to revisit and overrule its *Breard* holding on the grounds that the ICJ, in *LaGrand* and

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[16] At the time of the Court's *Breard* decision, the ICJ had not yet issued its decisions in *LaGrand* or *Avena*. The ICJ had, however, issued an order "requesting that the United States 'take all measures at its disposal to ensure that * * * Breard is not executed pending the final decision in these proceedings.'" 523 U.S. at 374. In spite of the ICJ's order, the Court issued an order denying any relief to Breard, finding that his argument that the Vienna Convention trumped state procedural bar rules "plainly incorrect." *Id.* at 375.

Avena, disagreed, and the President later directed the States to take actions to implement the *Avena* decision. The President's decision to implement the ICJ's *Avena* judgment in the cases of those individuals addressed in *Avena* does not, contrary to petitioner's understanding (05-51 Pet. Br. 44), have any relevance to his case. The President's decision to implement the *Avena* judgment was not based on an interpretation of the Vienna Convention. Rather, it was based on the President's constitutionally based foreign affairs power, *American Ins. Ass'n*, 539 U.S. at 414, and other treaties and statutes.[17] And a determination to comply with an ICJ decision does not require agreement with the ICJ's treaty interpretation. Indeed, the President's determination was made contemporaneously with the United States' brief amicus curiae in *Medellin*, in which the United States specifically disputed the correctness of the interpretation of Article 36 that underlay the ICJ's *Avena* decision. The President's determination offers no basis for this Court to revisit its earlier holding as to Article 36(2)'s meaning.

Nor do the ICJ's *LaGrand* and *Avena* decisions warrant reconsideration of the Court's holding in *Breard*. The ICJ reasoned that applying the procedural default rule to bar consideration of a challenge to a defendant's conviction and sentence violates Article 36(2)'s requirement that laws of the forum state "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *LaGrand*, 2001 I.C.J. para. 91, at 497-498. But this Court already considered Article 36(2)'s "full effect" language

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[17] The President's decision to comply with the ICJ decision rested on his authority to implement the United States' obligations under United Nations Charter (which is itself a ratified treaty), including the undertaking to comply with the judgment of the ICJ in cases to which the United States is a party, United Nations Charter, art. 94, 59 Stat. 1051, and his constitutional and statutory (under the United Nations Participation Act, 22 U.S.C. 287, 287a) responsibility to direct all functions connected with the participation of the United States in the United Nations, including the ICJ.

in *Breard* and concluded, correctly, that it does not "trump[] the procedural default doctrine." 523 U.S. at 375. Application of the procedural default rule to an Article 36 claim no more prevents "full effect" from being given to the Convention's purposes than application of the same rule prevents full effect from being given to the purposes of constitutional rights, such as the right against compelled self-incrimination. See *Breard*, 523 U.S. at 376 (AEDPA procedural rule governs "Breard's ability to obtain relief based on violations of the Vienna Convention * * * just as any claim arising under the United States Constitution would be"); *Ylst* v. *Nunnemaker*, 501 U.S. 797, 801 (1991) (procedural default applies to *Miranda* claims); *Wainwright* v. *Sykes*, 433 U.S. at 87-88 (procedural default applies to voluntariness claims).

The ICJ's decisions in *LaGrand* and *Avena* are clearly not binding on this Court in this case. Quite apart from this Court's independent authority to declare the meaning of the treaty, Article 59 of the Statute of the ICJ says that its decisions are binding only "between the parties and in respect of that particular case." Stat. of the ICJ, 59 Stat. 1062. Moreover, the United States' undertaking under Article 94 of the United Nations Charter, 59 Stat. 1051, to comply with a decision of the ICJ in a dispute to which it is a party, is to comply with the ICJ's ultimate resolution of the dispute, not to accept all the reasoning that leads to that resolution. In this case, the ICJ's reasoning is not persuasive. In *LaGrand*, the ICJ's reasoning on this point was no more than a mere statement that, "the procedural default rule prevented [counsel] from attaching any legal significance to the fact * * * that the violation of * * * Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention," and, therefore, "the procedural default rule had the effect of preventing 'full effect [from being] given'" to Article 36(1)(b). *LaGrand*, 2001 I.C.J. para. 91, at 497-498. By that reasoning, any procedural rule that pre-

vented a court from deciding the substance of a Vienna Convention claim—such as a State's statute of limitations for seeking collateral review—would have to be set aside as inconsistent with Article 36(2). As this Court held in *Breard*, 523 U.S. at 375, there must be a far more "clear and express statement" before a treaty will be construed to require the forum State to set aside all such procedural rules—particularly when, as here, the Convention's own terms provide that its rights must be exercised "in conformity with the laws and regulations of the receiving State." Vienna Convention, art. 36(2).

B. Nothing About Vienna Convention Claims Takes Them Outside The Procedural Bar Rule

Bustillo alternatively contends (05-51 Pet. Br. 39-42) that Vienna Convention claims are different from most challenges to a criminal trial because the facts and issues can only be fully developed on collateral review. Petitioner relies on *Massaro* v. *United States*, 538 U.S. 500 (2003), in which the Court held, as a matter of its supervisory authority, *id.* at 504, that ineffective assistance of counsel claims "may be brought in the first instance in a timely motion in the district court under [Section] 2255 * * * whether or not the petitioner could have raised the claim on direct appeal," *ibid.* Consular notification claims, however, are markedly different from ineffective assistance of counsel claims, and the rationale that supports *Massaro* does not support a similar rule here.

If a defendant's Vienna Convention claim seeks, as Sanchez-Llamas does, suppression of evidence, the issues (assuming the availability of the remedy) would be nearly indistinguishable from a motion to suppress under *Miranda* or *Mapp*. It would be far more efficient to litigate that evidentiary issue before trial, rather than on habeas review, when any relief would require yet another round of litigation. If, as in Bustillo's case, the claim concerns delay in obtaining assistance from the consulate that could have produced evi-

dence at trial, again, it would be far better to litigate the question of a violation *at trial*, when a continuance would allow a (belatedly informed) consulate to provide any assistance it might be willing to offer.

A Vienna Convention claim is wholly unlike a claim of ineffective assistance of counsel. Trial counsel who performed deficiently cannot reasonably be expected to note his deficient performance by way of a contemporaneous objection or to make a record showing that his unprofessional actions or omissions prejudiced his client. As this Court explained, even if the defendant has new counsel on direct appeal, it would be judicially "inefficient" to require new counsel to raise for the first time ineffective assistance of counsel claims, as such a requirement would "create perverse incentives for counsel on direct appeal" to assert ineffectiveness claims "regardless of merit"; compel appellate counsel "to raise the [ineffectiveness] issue before there has been an opportunity fully to develop the factual predicate for the claim"; require initial consideration of ineffectiveness claims in an appellate forum "not best suited" to assess undeveloped facts; and create an "awkward" relationship between a defendant's trial and appellate counsel that could hamper his appeal. *Massaro*, 538 U.S. at 504-506. None of those considerations applies to consular notification claims.

An unstated premise of Bustillo's argument that consular notification claims should be treated like ineffective assistance of counsel claims for purposes of the procedural bar appears to be that the foreign national will regularly be unaware of his Vienna Convention claim at trial, but will discover it later. Even if a foreign national may not be personally aware that he is free to contact his consulate to ask for assistance, trial counsel should be in a position to advise his client of that right and to object to any violation of it, as the preserved claims in No. 04-10566 demonstrate. Relying on counsel to identify a Vienna Convention claim is no different from relying on counsel to raise potential constitutional claims

that are unknown to the defendant, including claims—such as one under *Miranda*—that the government failed to provide a detainee with required information about his rights.

A rule that allowed foreign national defendants to withhold their Vienna Convention claims until collateral review would encourage tactical gamesmanship that should be discouraged. For example, defense counsel with a plausible but untested defense might be tempted to delay seeking assistance from his client's consulate when the assistance might help but could also harm the defense, with knowledge that, in the event of a conviction, the consulate could be contacted and any helpful evidence could then be used to demonstrate prejudice from the Vienna Convention violation. Virginia's procedural bar rule reasonably, and permissibly, prevents such tactical behavior.

CONCLUSION

The judgments of the Virginia Supreme Court and the Oregon Supreme Court should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED

A. The Supremacy Clause to the Constitution, U.S. Const. Art. 6, Cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

B. The Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, provides in its Preamble and Article 36:

> The States Parties to the present Convention,
>
> Recalling that consular relations have been established between peoples since ancient times,
>
> Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,
>
> Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

* * * * *

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to

the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

C. The Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487, provides in pertinent part:

The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as "the Convention", adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,

Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has

been agreed upon by the parties within a reasonable period,

Have agreed as follows:

Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

* * * * *

D. Article 94 of the United Nations Charter, June 26, 1945, 59 Stat. 1033, 1051, provides:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

E. Article 59 of the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 1062, provides:

> The decision of the Court has no binding force except between the parties and in respect of that particular case.

F. The United Nations Participation Act, 22 U.S.C. 287, 287a, provides:

Section 287. Representation in Organization

(a) Appointment of representative; rank, status, and tenure; duties

The President, by and with the advice and consent of the Senate, shall appoint a representative of the United States to the United Nations who shall have the rank and status of Ambassador Extraordinary and Plenipotentiary and shall hold office at the pleasure of the President. Such representative shall represent the United States in the Security Council of the United Nations and may serve ex officio as representative of the United States in any organ, commission or other body of the United Nations other than specialized agencies of the United Nations, and shall perform such other functions in connection with the participation of the United States in the United Nations as the President may, from time to time, direct.

(b) Appointment of additional representatives' rank, status, and tenure; duties; reappoint, went unnecessary

The President, by and with the advice and consent of the Senate, shall appoint additional persons with appropriate titles, rank, and status to represent the United States in the principal organs of the United Nations and in such organs, commissions, or other bodies

as may be created by the United Nations with respect to nuclear energy or disarmament (control and limitation of armament). Such persons shall serve at the pleasure of the President and subject to the direction of the Representative of the United States to the United Nations. They shall, at the direction of the Representative of the United States to the United Nations, represent the United States in any organ. commission, or other body of the United Nations, including the Security Council, the Economic and Social Council, and the Trusteeship Council, and perform such other functions as the Representative of the United States is authorized to perform in connection with the participation of the United States in the United Nations. Any Deputy Representative or any other officer holding office at the time the provisions of this Act, as amended, become effective shall not be required to be reappointed by reason of the enactment of this Act, as amended.

Section 287a. Action by representatives in accordance with Presidential instructions; voting

The representatives provided for in section 287 of this title, when representing the United States in the respective organs and agencies of the United Nations, shall, at all times, act in accordance with the instructions of the President transmitted by the Secretary of State unless other means of transmission is directed by the President, and such representatives shall, in accordance with such instructions, cast any and all votes under the Charter of the United Nations.

Supreme Court, U.S.
FILED
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(14) (19)

Nos. 04-10566 & 05-51

In the Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,
Petitioner,
v.
STATE OF OREGON,
Respondent.

MARIO A. BUSTILLO,
Petitioner,
v.
GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari
to the Supreme Courts of Oregon and Virginia

BRIEF OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

(1) Does the Vienna Convention convey individual rights of consular notification and access to a foreign detainee enforceable in the Courts of the United States?

(2) Whether, contrary to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations, April 24 1963, 21 U.S.T. 77, 100-101, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or because the treaty does not create individual rights?

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INTEREST OF *AMICI CURIAE*

The State *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Respondents. Under the Supremacy Clause, the States are bound to observe the terms of Article 36 of the Vienna Convention on Consular Relations, done Apr. 24, 1963, 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261, 292-94. All 50 States have foreign nationals (and alleged foreign nationals) incarcerated in their state prison systems. According to a recent government report, more than 57,000 foreign nationals were incarcerated in State prisons as of mid-2004. Paige M. Harrison & Allen. J. Beck, *Prison and Jail Inmates at Midyear 2004* (Table 6), http://www.ojp.usdoj.gov/bjs/abstract/pjim04.htm (last revised April 24, 2005).

This case will determine whether the Vienna Convention creates individual rights enforceable in American Courts and, if so, whether those rights displace well-established criminal-procedure doctrines applied across the country. Because the resolution of the issues presented in this case may profoundly affect every State criminal-justice system, the States have a substantial interest in opposing Petitioners' attempt to create judicially-enforceable rights and implied procedural requirements in the Vienna Convention.

SUMMARY OF THE ARGUMENT

The Vienna Convention does not create individual rights: The Vienna Convention, by its own terms, defines the reciprocal rights and obligations of nations in the exchange of consuls. It expressly disavows the creation of individual rights. Although some incidental language in Article 36 of the Convention might be read, in isolation, as discussing individual rights, it is insufficient to overcome the presumption that a treaty does not create individual rights absent a clear and unambiguous statement to that effect. This presumption prevents the courts from inadvertently expanding treaties beyond the President's and the Senate's intent in entering into and ratifying them. In this case, the Senate ratified the Convention under the belief that it would not change the existing

laws of the United States. This confirms that the Convention should not be read to change United States domestic law.

The Vienna Convention Does Not Impose Judicial Requirements on the United States: The Petitioners and their *amici* argue that the Vienna Convention enacted two procedural requirements as federal law: abrogation of the procedural-default doctrine and adoption of an exclusionary rule regarding consular-notification failures. The text of the Convention does not establish those requirements.

Like the state courts, the judiciaries of other nations have universally refused to apply Article 36 of the Vienna Convention in the way the Petitioners seek. The Court should not interpret the holdings of the International Court of Justice or the amicus briefs filed in this case by foreign sovereigns as an indication that the treaty is so applied abroad. "Litigation" before the ICJ is part of a political and diplomatic—not a legal—dispute-resolution mechanism that ultimately results in political negotiation at the level of the U.N. Security Council. The foreign nations that accord additional procedural rights based on consular notification do so based on their own domestic statutes or common-law authority, not based on the Vienna Convention as such.

The Court Should Maintain its Reluctance to Interfere in the States' Criminal-Procedure Systems Absent a Violation of the U.S. Constitution: Petitioners ask the Court to change U.S. law despite the Senate's understanding that the Vienna Convention would not change United States domestic law. Petitioners and *amici* argue that changing the States' criminal-procedure laws will serve as a more effective way to implement the Convention and will benefit the United States diplomatically. These policy justifications, even if true, are political, rather than legal. Such policy balancing is best left to the political branches and to the States, which retain authority to administer their own criminal-justice systems.

State-law procedural default is an adequate and independent state-law ground for refusing to reconsider criminal convictions, and the Court has consistently declined to interfere with the doctrine, even allowing it as a bar to claims brought under the federal Constitution. Petitioners ask the Court to interfere with state criminal procedure without providing basis in the federal Constitution for doing so. The Court should not acountenance such interference, especially given the Court's longstanding recognition of the importance of the procedural-default doctrine to the efficient and fair functioning of the criminal-justice system.

ARGUMENT

Petitioners frame this case as a dispute between the States of Oregon and Virginia and the federal government regarding the implementation of Article 36 of the Vienna Convention. There is no such dispute—the States fully recognize their obligation to comply with the United States' treaty obligations.

Indeed, on this issue, the States and the United States are of one accord.

The impediment to implementing the Vienna Convention as Petitioners request is not resistance from the States. Instead, the Court's treaty-interpretation precedent, limited as it is by the strictures of the constitutional framework of government, forecloses that result. And rightly so, given that other nations do not consider the Vienna Convention, by itself, to form a basis for invalidating criminal convictions.

I. THE VIENNA CONVENTION DOES NOT CONFER INDIVIDUAL RIGHTS.

The Vienna Convention on Consular Relations is a 79-article, multilateral treaty negotiated in 1963 and ratified by the United States in 1969. The treaty governs "the establishment of consular relations, [and] defin[es] a consulate's functions in a receiving

state." *United States v. Alvarado-Torres*, 45 F.Supp.2d 986, 988 (S.D. Cal. 1999). Article 36(1)(b) of the Convention states that the authorities of a "receiving state" shall, without delay, inform any detained foreign national of his right to have the consular post of the "sending state" notified of his detention. Article 36(1)(a) provides that consular officers shall be free to communicate with nationals of the sending state, and Article 36(1)(c) gives consular officers the right to visit and correspond with the detained foreign national and to arrange for his legal representation. *Id.*

Both Petitioners argue that Article 36 creates individual rights and that it constitutes binding federal law by virtue of the fact that the Vienna Convention is a self-executing treaty. Sanchez-Llamas Merits Br. at 11-14; Bustillo Merits Br. at 16-20. This reasoning is inconsistent with the text of the Convention itself—the preamble to the Vienna Convention expressly disavows the creation of individual rights, and the Convention's ratification history demonstrates that the Senate did not believe that the Convention would change existing United States law.

A. The Text of the Vienna Convention Does Not Create Individual Rights.

Treaty provisions are construed according to the traditional rules of statutory construction, and the Court looks first to the plain language. *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."). As the Court did when construing Article 36 in *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam), it should begin with the Convention's text. The text of the Convention is clear. Neither Article 36 nor the other provisions of Chapter II of the Convention were intended to create individual rights.

1. The text of the Convention does not require that violations of consular notification be remedied in criminal proceedings.

The Vienna Convention is based on the premise that "an international convention on consular relations, privileges and immunities would ... contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." VIENNA CONVENTION, preamble. The Convention expressly provides,

> "the purpose of [the] privileges and immunities [discussed in the Convention] is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States." *Id.* (emphasis added).[1]

Chapter II of the Convention, in which Article 36 appears, is entitled "Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and Other Members of a Consular Post." Its focus is the prerogatives of the "sending State," not individual foreign nationals. Article 36, in turn, is in Section I of Chapter II—a Section itself titled "Facilities, Privileges and Immunities Relating to a Consular Post." Notably, Article 36 is not found in Section II, which deals with facilities, privileges, and

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3. The preamble to a treaty is negotiated language that generally sets forth the purpose of the contracting parties in choosing particular words to implement specific obligations. *See Olympic Airways v. Husain*, 540 U.S. 644, 660-61 (2004) (looking to the Warsaw Convention's preamble to determine the purpose of the contracting parties); *El Al Israeli Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 156-57 (1999) (same); *Alvarez-Machain*, 504 U.S., at 672-73 (relying on preamble to extradition treaty with Mexico to determine intent of contracting states).

immunities of individuals, *i.e.*, consular officers and other "members of the consular post."[2]

In keeping with the overall purpose of the Convention, Article 36 begins with the express statement that the provisions of paragraph (1), including the requirements of consular notification at issue in this case, are established "with a view to facilitating the exercise of consular functions relating to nationals of the sending State." Paragraph 2 of Article 36 provides that "rights referred to in paragraph 1" of the Article "shall be exercised in conformity with the laws and regulations of the receiving State," so long as those laws "enable full effect to be given" to the purpose of the rights accorded by Article 36—those purposes being specified as "facilitating the exercise of consular functions" as described in paragraph 1. When Article 36 is violated, the aggrieved party is the sending State, because it is the sending State whose consular operations have been hindered by the violation.

Although Article 36 may provide some collateral benefits to individual foreign nationals, its overriding purpose is to facilitate the performance of consular functions by consular officials. Given that the Convention's preamble expressly states that the purpose of the treaty is not to create individual rights, the Court should reject

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2. Bustillo erroneously argues that the preamble cannot control interpretation of Article 36 because, as a result, the preamble would prevent Section II from conferring rights on consular personnel. Bustillo Merits Br. at. 33 & n.9. Bustillo ignores the fact that Section II does not create rights for foreign citizens generally, but only to consular personnel, as an element of their official duties on behalf of the sending State. *E.g.*, *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 693-94 (1976) (recognizing that the scope of consular privileges and rights is determined by the capacity in which an individual represents a foreign government, and is not held by the individual as such).

Petitioners' invitation to discover such rights in Article 36 — which would directly contravene the negotiated meaning of the treaty.[3]

2. Article 36 does not overcome the presumption that treaties do not create individual rights.

The term "self executing" usually is applied to any treaty that according to its terms takes effect upon ratification and requires no separate implementing statute. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111(4) (1987). It is beyond cavil that the Vienna Convention is self-executing in the sense that no implementing legislation was required.

However, whether the terms of a treaty provide for private rights that are enforceable in domestic courts is a wholly separate question. *See id.*, at §111, cmt. h; *see also United States v. Li*, 206 F.3d 56, 68 (CA1 2000) (Selya & Boudin, JJ., concurring) ("That courts sometimes discuss [self-execution in the sense of need for implementing legislation and self-execution as creating individual rights] together ... does not detract from their distinctiveness. At

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3. Notably, the ICJ's judgment in which it declared that Article 36 creates an individual right analyzes the Article in isolation, without mentioning the preamble. *See LaGrand* (F.R. G. v. U S.), 2001 I.C.J. 466 (June 27), ¶67. Vice President Shi's concurrence sheds some light on the ICJ's strategic drafting of paragraph 67, which Vice President Shi criticized for ignoring the preamble's plain text. *See LaGrand*, Separate Opinion of Vice-President Shi, ¶5. Yet, although he believed that "the view that Article 36, paragraph 1, specifically subparagraph (b), creates individual rights is at the very least a questionable one," *id.* ¶16, Vice President Shi nonetheless voted for the portion of the judgment requiring "review and reconsideration of the conviction and sentence," *see LaGrand*, ¶127(7), on the explicit ground that because the case involved the death penalty "every possible measure should be taken to prevent injustice or an error in conviction or sentencing," Separate Opinion of Vice-President Shi, ¶17.

bottom, the questions remain separate."). Petitioners' contention that the Vienna Convention is "self-executing" in the sense that it creates individual rights enforceable in American judicial proceedings, either directly or by virtue of the ICJ's opinions on the issue, is simply incorrect. In light of the principles governing the interpretation of treaties, neither the text nor the history of the Vienna Convention supports Petitioners' claims.

The general rule is that "[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." RESTATEMENT (THIRD) §907, cmt. a. This rule derives from the longstanding principle that "[a] treaty is primarily a compact between independent nations," and that it "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *The Head Money Cases*, 112 U.S. 580, 598 (1884).

Because treaty violations have traditionally been resolved by "international negotiations and reclamations," the Court has concluded that "[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id.* This principle has consistently been applied by U.S. courts. *See, e.g., Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (holding that the Geneva Convention on the High Seas and the Pan-American Maritime Neutrality Convention, "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action.").[4]

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4. *See also Goldstar v. United States*, 967 F.2d 965, 968 (CA4 1992) ("International treaties are not presumed to create rights that are privately enforceable."); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (CA5 2001) ("[Treaties] do not generally create rights that are enforceable in the courts."); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808

Moreover, settled principles of treaty construction obligate the Court to avoid the constitutional conflict that would be occasioned by Petitioners' proposed interpretation. Statutes are "to be so construed so as to avoid serious doubt of their constitutionality." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961). The same canon of constitutional avoidance has always applied to treaties as well. *See Murray v. the Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Thus, if it is "fairly possible" to construe a statute or treaty without contravening the Constitution, the Court should do so. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). The presumption against individual rights is a means of avoiding constitutional conflict—although both treaties and laws are "the law of the land" under the Supremacy Clause, U.S. CONST. art. VI, cl.2, treaties and laws are not automatically the same thing. Treaties fall within the Executive branch's foreign-affairs power, subject to Senate approval, *id.*, art. II, §2, while laws fall within Congress's legislative authority, subject to the Executive's veto, *id.*, art. I, §7. The grants of power are not coextensive. A low standard for determining that a treaty creates individual rights would necessarily lead to potential constitutional

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(CADC 1984) (Bork, J., concurring) ("Treaties of the United States, though the law of the land, do not generally create rights that are privately enforceable in the courts."); *Li*, 206 F.3d, at 66 (Selya & Boudin, JJ., concurring) ("The background presumption that treaties do not create privately enforceable rights . . . [is an] extremely important principle. . . . It is surprisingly difficult to accept the idea that, in most instances, either the Executive Branch or the ratifying Senate imagined that it was empowering federal courts to involve themselves in enforcement on behalf of private parties who might be advantaged or disadvantaged by particular readings of particular treaty provisions."); *accord Garza v. Lappin*, 253 F.3d 918, 924 (CA7 2001) (judgment of Inter-American Court did not bar imposition of death penalty because the treaty relied upon could not be construed to create individual rights); *United States v. Davis*, 767 F.2d 1025, 1030 (CA2 1985).

infirmities, because it would muddy the source of the federal government's authority.

A presumption against the creation of individual rights in treaties avoids potential constitutional infirmities by eliminating most instances in which a treaty could be construed to conflict with existing laws. The Court's cases draw a bright-line distinction. If a treaty either establishes a legal standard for particular type of claim or expressly states that it confers rights on foreign nationals, the Court applies the treaty in domestic courts. Otherwise, it does not. This test preserves the distinction between legislation and treaties; the Senate has the opportunity to evaluate the treaty in terms of any potential resulting change in the law.

For this reason, even treaties that directly benefit private parties are not necessarily construed to create private rights or provide for a private cause of action in domestic courts. For example, in *United States v. Gengler*, 510 F.2d 62, 67 (CA2 1975), the court held that "even where a treaty provides certain benefits for nationals of a particular state—such as fishing rights—it is traditionally held that any rights arising out of such provisions are, under international law, those of the state and ... individual rights are only derivative through states." Likewise, in *United States v. Rosenthal*, 793 F.2d 1214, 1232 (CA11 1986), the court found no merit in the defendants' argument that the actions of the United States violated its extradition treaty with Colombia because "[u]nder international law it is the contracting foreign government that has the right to complain about a violation."

A treaty *can* create individual rights, but only when the text of the treaty does so unambiguously. As recognized in *The Head Money Cases*, a treaty establishing particular "rights of property by

descent or inheritance," gives those obligations the force of law. 112 U.S., at 598.[5]

Both Petitioners provide lists of cases that, they argue, demonstrate that the Court always, without exception, applies treaties to protect private litigants. Sanchez-Llamas Merits Br. at 28-29; Bustillo Merits Br. at 18 & n.3. The referenced cases do not support Petitioners' arguments. Instead, they illustrate the specific and narrow circumstances in which the Court has held that treaties provide judicially-enforceable individual rights. Each treaty either (1) contains an express statement to that effect or (2) expressly adopts a specific legal standard governing cases involving foreign nationals.

Thus, for example, in *Kolovrat v. Oregon*, the treaty stated that "Serbian subjects in the United States[] *shall enjoy the rights*" granted to most-favored nations. 366 U.S. 187, 192 n.6 (1961) (emphasis added). The sole case cited by the Petitioners involving a multilateral convention specifically governed the reciprocal rights of citizens regarding trademarks. *Bacardi Corp. v. Domenech*, 311 U.S. 150, 169 (1940) (discussing section titled "Equality of Citizens and Aliens as to Trade Mark and Commercial Protection"). These

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5. The sole case cited by Petitioners involving the privileges of a foreign consulate in fact rejected Petitioners' position. In *Wildenuhus's Case*, 120 U.S. 1 (1887), the *Belgian Consul* sought to bring a habeas corpus claim regarding a suspect in a murder committed aboard a Belgian vessel anchored in a United States port. In holding that the consul held a right under the bilateral consular-relations treaty between the United States and Belgium, the Court recognized that the treaty "settle[d] and define[d] the rights and duties of the contracting parties", *id.* at 12, and not those of the individual criminal suspect.

treaties create individual rights because they contain *express language* to that effect.[6]

Other treaties expressly establish legal standards. Thus, the two extradition cases Petitioners cite, *United States v. Rauscher*, 119 U.S. 407 (1886), and *Johnson v. Browne* , 205 U.S. 309, 320-22 (1907), recognized that the rule of "specialty" governs extradition treaties as a matter of international custom and therefore informs the courts' application of extradition law. That custom has now been adopted by statute. *See United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992). Likewise, treaties governing seizure of foreign ships expressly create legal standards that apply in admiralty.[7] *Cook v. United States*, 288 U.S. 102, 111-12 (1933);

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6. The most important early cases involve the United States' treaty obligations to protect the property rights of British citizens following independence. The United States had undertaken to guarantee those rights as a condition of peace with Great Britain; accordingly state laws predating adoption of the Constitution could not trump the bargain regarding property rights. *See Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1812) ("British subjects ... shall continue to hold [their lands]"); *Higgonson v. Mein*, 8 U.S. (4 Cranch) 415, 419 (1808) ("all persons who have any interest in confiscated lands ... shall meet with no lawful impediment in the prosecution of their just rights"); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 103, 110 (1801) (same); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 258-59 (1796).

7. The remaining treaty provisions on which the Court has recognized a treaty right were bilateral treaties of amity and commerce specifically designed to create individual rights for the citizens of foreign countries, including Germany, *Clark v. Allen*, 331 U.S. 503, 514-15 (1947); Denmark, *Nielsen v. Johnson*, 279 U.S. 47, 51 (1929); Japan, *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928), *Asakura v. City of Seattle*, 265 U.S. 332, 340 (1924); China, *Cheung Sum Shee v. Nagle*, 268 U.S. 336, 345; *Chew Heong v. United States*, 112 U.S. 536, 542 (1884); France, *de Geofroy v. Riggs*, 133 U.S. 258, 266 (1890); *Chirac v.*

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

Article 36 neither contains language expressly creating an individual right of consular notification, nor does it establish a legal standard for evaluating such lawsuits. It does not, therefore, create a judicially-enforceable individual right under the Court's precedent.

B. The State Department Has Consistently Construed the Convention Not to Create Individual Rights.

The State Department has consistently maintained that the Vienna Convention does not create individual rights. The United States' historic interpretation of the Vienna Convention should be accorded substantial deference. *See, e.g., El Al Israeli Airlines v. Tseng*, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

In *United States v. Li*, the First Circuit specifically posed the question whether the Vienna Convention creates individual rights, and the State Department advised the court that the Convention is a treaty that establishes state-to-state rights and obligations, not individual rights. *See* 206 F.3d, at 63 (citing "Department of State Answers to the Questions Posed By the First Circuit in United

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Chirac's Lessee, 15 U.S. (2 Wheat.) 259, 270 (1817); Switzerland, *Hauenstein v. Lynham*, 100 U.S. 483, 584-86 (1879); and the United Kingdom, *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489, 496 (1824); *Soc'y for Propagation of Gospel v. New-Haven*, 21 U.S. (8 Wheat.) 464 (1823) (same); *Craig v. Radford*, 16 U.S. (3 Wheat.) 594 (1818) (same).

States v. Nai Fook Li," hereinafter "State Department Li Answers," at A-1, A-3). The State Department specifically addressed the remedies for violations of the consular notification procedures: "The [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Id.* The United States reiterated this history in its *amicus curiae* brief supporting the State of Texas in *Medellin v. Dretke*, No. 04-5928, Brief for the United States as *Amicus Curiae* Supporting Respondent, at 22-23.

As *Li* noted, the State Department's position on the Convention may be traced to the treaty's inception. The court first pointed to a 1970 letter sent by a State Department legal adviser to the governors of the fifty States shortly after the Convention's ratification, advising that the Department did "not believe that the Vienna Convention will require significant departures from the existing practice within the United States." *Id.*, at 64. In 1989, a letter from a Department legal adviser informed a foreign national being held in an American prison that "[w]hile the U.S. authorities are required to comply with the obligations [of Article 36], failure to do so would have no effect on [his] conviction or incarceration." *Id.*

Li also pointed to the State Department's written submission to the Inter-American Court of Human Rights in 1998, when Mexico sought an advisory opinion on the availability of criminal remedies for failures of consular notification—the precise issue raised in this case. The Department's submission unequivocally stated that the Vienna Convention "does not require the domestic courts of State parties to take any actions in criminal proceedings, either to give effect to its provisions or to remedy their alleged violation." *Id.* (emphasis added). The *Li* court thus correctly concluded that "the Department has denied the availability of criminal remedies for failures of consular notification." *Id.*

C. The History of the Convention Does Not Demonstrate an Intent to Create Individual Rights in Article 36.

The plain text of the treaty disclaims individual rights. Even if there were any ambiguity, it should be resolved against finding such rights. When a treaty's terms are considered ambiguous, the Court typically relies upon nontextual sources "such as a treaty's ratification history and its subsequent operation." *United States v. Stuart*, 489 U.S. 353, 366 (1989). Petitioners turn to the ratification history and *travaux préparatoires* of the Convention to suggest that Article 36 was intended to create individual rights. *See* Sanchez-Llamas Merits Br. at 23-26; Bustillo Merits Br. at 24-29. But the passing references to the negotiation and ratification of the Vienna Convention contained in Petitioners' account do not tell the whole story—the United States ratified the treaty under the express condition that it would effect no change in domestic law.

Senate Committee on Foreign Relations Chairman William J. Fulbright's report to the Senate highlighted the treaty's preamble and then listed five factors that helped secure the Committee's approval. The very first such factor was the Committee's belief that the "Vienna Convention *does not change or affect present U.S. laws or practice*." S. Exec. Doc. E app., 91-1, at 46 (1969) (emphasis added). That statement of Senate intent would be incomprehensible if the treaty were in fact understood to create individual rights that could abrogate U.S. statutes and the procedural-default rule in all 50 States, across the criminal-justice system.

Moreover, despite casual statements suggesting the contrary, the State Department's only formal answer to the question whether the Convention created individual rights was altogether negative. A State Department legal adviser submitted written testimony on the Convention to the Senate Committee on Foreign Relations on October 7, 1969. The statement indicated that the "Vienna ... Convention does *not* have the effect of overcoming Federal or State

laws beyond the scope long authorized in existing consular conventions." *Id.* (emphasis added). The Department's testimony also emphasized the Vienna Convention's preamble, which states explicitly that the treaty's purpose is "not to benefit individuals." S. Exec. Doc. E app., 91-1, at 46 (1969).

Nor do the *travaux préparatoires* include more than a passing reference to consular notification being a right held by a citizen. Certainly, the *travaux* include no express indication of an intent to expressly create rights. The passing references to the notification right as belonging to the individual are, therefore, the most convenient mechanism for referring to the reciprocal obligation between nations. *See Li*, 206 F.3d, at 66 (Selya & Boudin, JJ., concurring).[8] Moreover, the Statements from the *travaux* on which the Petitioners rely must be read in context. Article 36 was framed in terms of an individual's choice to contact his national consulate in order to ensure that defectors and captured military officers would not be required to contact their own governments against their wills. *See* 1 U.N. Conference on Consular Relations: Official Records, at 38 ¶ 21; 83-84 ¶¶ 73 & 74, U.N. Doc.A1 Conf.25/16 U.N. Sales No. 63.X.2 (1963). The language was thus drafted as it

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8. *See Li*, 206 F.3d, at 66 (Selya & Boudin, JJ., concurring):

> "It is common ground that the [Convention is an] agreement[ ] among sovereign States. Nothing in [its] text explicitly provides for judicial enforcement of [ ] consular access provisions at the behest of private litigants. Of course, there are references in the treaties to a 'right' of access, but these references are easily explainable. The contracting States are granting each other rights, and telling future detainees that they have a 'right' to communicate with their consul is a means of implementing the treaty obligations *as between States*. Any other way of phrasing the promise . . . would be both artificial and awkward." (emphasis in original).

is in order to limit the scope of the consular nations' rights over its citizens. Nothing in the *travaux* indicates an intent on the part of the parties to the treaty to adopt consular notification as an element of their domestic criminal law.

D. Fulfilling Treaty Obligations Under Article 36 is the Task of the Political Branches.

As the Court has long recognized:

> "the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and long have been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Airlines v. Waterman SS Corp.*, 333 U.S. 103, 111-12 (1948).

A nation considering itself harmed by congressional enactment following a treaty may "present its complaint to the executive head of the government.... The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

Nor is the judiciary well suited to determine how the United States should act under a treaty, because the United States has discretion to disregard treaty obligations: the President has the power to waive treaties, *Charlton v. Kelly*, 229 U.S. 447, 475-76 (1913), and Congress may enact inconsistent legislation, *Whitney*, 124 U.S., at 194. The Executive Branch is best-suited to foresee the

implications of its actions regarding treaties because the State Department maintains diplomatic contacts throughout the world. The choice of the best manner in which to fulfill a treaty—or, in the alternative, whether to negotiate for a lesser obligation or even to withdraw from an obligation entirely—is by necessity "delicate" and "complex." As a prudential matter, the courts should not interfere in the process.

II. THE COURT SHOULD NOT ADOPT THE ICJ'S INTERPRETATION OF ARTICLE 36, WHICH IS CONTRARY TO THE ACTUAL PRACTICE OF PARTIES TO THE VIENNA CONVENTION.

Petitioners do not rely on the decisions of the International Court of Justice in *Avena and Other Mexican Nationals* (Mexico v. U.S.), 2004 I.C.J. 12 (Mar. 31) and *La Grand* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27), as direct authority, although Sanchez-Llamas argues that those decisions deserve deference in the interest of "uniform treaty interpretation." Sanchez-Llamas Merits Br. at 26-28; Bustillo Merits Br. at 30-31. Many of Petitioners' *amici* argue that the Court should defer to the ICJ's interpretation of Article 36. *E.g.*, E.U. *Amicus* Br., at 3-7.[9]

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9. Bustillo's statement that 63 nations have filed briefs in support of his position is somewhat misleading to the extent it includes all of the members of the European Union. Bustillo Merits Br. at 29. The E.U. is not a party to the Vienna Convention and only three of its member nations, Liechtenstein, Norway, and Switzerland, were willing to join the E.U.'s *amicus* brief in their capacity as signatories to the Convention. E.U. *Amicus* Br. at 2. The only reported judicial opinion from an E.U. member country that is also a party to the Convention, Germany, has in fact refused to provide "review and reconsideration" of a criminal conviction based on Article 36. *See* BGH 5 StR 116/0 decided on 7 Nov. 2001, available at http://www.bundesgerichtshof.de (Germany).

These arguments are all based on an untenable premise—that the ICJ's interpretation of Article 36 represents the uniform application of the treaty. It does not, and neither Petitioners nor their *amici* mention a single instance in which another country's courts have revisited a criminal conviction based on a defendant's consular-notification rights absent a domestic statute requiring that result. Nor do other nations apply the ICJ's decisions in their domestic courts as a general matter.

A. The ICJ's Interpretation of Article 36 is Contrary to Actual International Practice.

In *LaGrand*, the ICJ determined that Article 36 creates individual rights. 2001 I.C.J, at 493, ¶¶73 & 74. And in *Avena*, the ICJ determined that Article 36 mandates "review and reconsideration" of criminal convictions. 2004 I.C.J., at 35-36, ¶40. At the time *LaGrand* was decided in 2001, according to the State Department, no country in the world had interpreted the Vienna Convention to create individual rights or ordered reconsideration of a criminal conviction based on violation of Article 36.[10] Thus, *LaGrand* itself rejected the prevailing, uniform interpretation of the Convention.

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10. After a comprehensive investigation into international practice, the State Department "found no indication that other states party have remedied such failures by granting remedies in the context of their criminal justice proceedings." State Department *Li* Answers at A-8, A-9 (commenting that no party had produced a single example of a nation providing a judicial remedy for Article 36 violations); *see also Avena*, Counter-Memorial of the United States, at 288-90 (Mexico failed to provide a single example of a state practice of reconsidering convictions based on consular-notification); *Canada v. VanBergen*, 261 A.R. 387, 390 (2000) (rejecting legal challenge to extradition from Canada based on Article 36); *R. v. Abbrederis*, [1981] 36 A.L.R. 109 (Australia), 122-23; *Re Yater*, "Judicial Decisions," 1976 Ital. Y.B. Int'l Law, at 336-39, Vol. II (decided by Italy's Court of Cassation Feb. 19, 1973).

Although some courts have stated in passing that Article 36 creates an "individual right," international practice has not changed since the *Avena* decision. At least two courts have refused to apply the ICJ's judgment as a basis for revisiting a conviction—including a court in Germany, the party that brought *LaGrand* in the first place. *See* BGH 5 StR 116/0 decided on 7 Nov. 2001, available at http://www.bundesgerichtshof.de (Germany); *see also R. v. Partak*, [2-1] 160 C.C.C. (3d) 553, 570 (Canada). There is thus a divergence between the diplomatic positions of foreign countries and the effect given to the Vienna Convention in actual judicial decisions.

Sanchez-Llamas suggests that the Canadian courts have recognized an individual right that applies in criminal proceedings by citing *Khadr v. Canada*, 123 C.R.R. (2d) 7, 23 (Fed. Ct. 2004) (Canada). Sanchez-Llamas Merits Br. at 27-28. *Khadr* was a suit by the parents of a Canadian national attempting to force the Canadian government to provide consular services to a Canadian citizen, who had been detained outside of Canada, under *a statute* prescribing the obligations of Canadian consuls. *Id.* at 19. The *Khadr* court used the Vienna Convention to inform its analysis of a Canadian statute, not as a basis for its decision. *Id.* at 26.[11]

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11. The countries that have applied the Vienna Convention to criminal convictions have done so based on internal statutes mandating that result. *See* NACDL/LCA Br. at 16-20 (discussing Part 1(C), Section 23P, of the Crimes Act 1914). As the NACDL's brief recognizes, the countries that apply an exclusionary rule based on the Vienna Convention all do so by statute, not based on the treaty itself. *Id.* at 17 n.11. None has applied *Avena*'s holding to revisit a criminal conviction. Nor have the United Kingdom's courts—which govern criminal procedure under their separate common-law authority rather than by application of a written constitution—applied an exclusionary rule based on Article 36. *See id.*, at 20. Rather, two U.K. trial courts have excluded evidence under their general common-law power to do so. *R. v. Bassil and Mouffareg* (1990)

In short, the Court should not interpret the *amicus* briefs filed by various foreign countries as a statement of those countries actual practice. Neither Petitioners nor Petitioners' *amici* cite even a single instance in which a foreign court has directly applied the Vienna Convention to collaterally attack or void a criminal conviction. *E.g.*, Mexico *Amicus* Br., at 7-30 (discussing in theory the application of Article 36 in U.S. courts, but not discussing Mexico's actual domestic practice). Indeed, Mexico's position in this case marks a reversal of its longstanding position that Article 36 violations should not be the basis for reversing criminal convictions.[12]

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28 July, Acton Crown Court HHJ Sich (reported in Legal Action 23, December 1990); *R. Van Axel and Wezer* (1991) 31 May Snaresbrook Crown Court, HHJ Sich (reported in Legal Action 12, September 1991). To the extent that courts in the United States retain such common-law power given the tendency to adopt statutory regimes governing criminal procedure, plenary authority to adopt such exceptions rests with the States and not with the Court, save for rights conferred by the federal constitution. *See infra*, part III.A.

12. Mexico's litigation posture in *Avena* was a reversal of its traditional position on the subject. The 1976 Treaty on the Execution of Penal Sentences, Nov. 25, 1976, Mex.- U.S., 28 U.S.T. 739, at Mexico's explicit insistence, provides for enforcement of Mexican convictions with no mention of Mexico's Article 36 violations. Mexico, in recognizing its own poor record in complying with Article 36, stated that "we cannot.... expect that irregularities will not occasionally be committed." Letter from Alfonso Garcia Robles, Foreign Minister of Mexico, to Henry A. Kissinger, Secretary of State of the United States of America (Mar. 25, 1976). Mexico's federal law governing consular-notification provides no judicial remedy for individuals, only a consular-notification requirement. LEYES Y CODIGOS DE MEXICO, C.F.P.P., art. 128.IV (1995) ("Si se tratare de un extranjero, la detencion se comunicara de inmediato a la representacion diplomatica o consular que corresponda." ("In the case of an alien, the fact that he has been placed in custody shall be reported

B. The ICJ's decisions do not provide a "rule of decision."

Amici ICJ Experts go one step further than the litigants and argue that *Avena* and *LaGrand* create a "rule of decision" that this Court has no power to disregard. ICJ Experts *Amicus* Br. at 20. They argue that the Optional Protocol to the Vienna Convention transforms the ICJ's judgments into part of the treaty, and that as a result the ICJ's decision is incorporated into United States law by the Supremacy Clause. However, the decisions of international tribunals are not themselves "treaties", nor do they fall within the other two categories of federal law—the "Constitution" and "Laws of the United States." U.S. CONST. art. VI, cl.2. The ICJ's decisions, by themselves, cannot create an individually enforceable right that requires reconsideration of a criminal conviction.

1. The only potential legal basis for deferring to the ICJ's decisions was the Optional Protocol, from which the United States has withdrawn.

The only potential basis for the Experts' position is the Optional Protocol to the Vienna Convention, a provision that refers disputes over the treaty to the ICJ. See OPTIONAL PROTOCOL TO THE VIENNA CONVENTION ON CONSULAR RELATIONS CONCERNING THE COMPULSORY SETTLEMENT OF DISPUTES, Apr. 24, 1963, 21 U.S.T. 77 (138a). By a letter deposited with the U.N. Secretary General on March 7, 2005, the United States has withdrawn from the Optional Protocol, and is no longer subject to its provisions. *See* http://travel.state.gov/news/news_2155.html (last visited January 24, 2006). The Experts merely assert their opinion that the United States' withdrawal from the Protocol was incorrect, without citing any authority. ICJ Experts *Amicus* Br. at 19-20.

And even if the United States remained a party to the Optional Protocol, it would be inappropriate under the Constitution for the

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immediately to the appropriate diplomatic or consular mission.")).

Court to recognize as binding the decision of a judicial body not recognized in the Constitution. The "judicial Power" discussed by the Constitution encompasses the duty to exercise the final say in the interpretation of federal law. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 777 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Under the Experts' interpretation, as a result of signing the Vienna Convention, the "judicial Power" has been placed not in "one supreme Court," but instead divided between this Court and the ICJ. To recognize the ICJ's judgments as binding would, pursuant to the actions of only the President and the Senate, effect a fundamental change in the constitutional structure.

Nothing in the President's foreign-affairs and treaty power allows a reordering of the judicial functions of the Article III courts that would otherwise be barred by the Constitution. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1870) ("[A] treaty cannot change the Constitution."). The Optional Protocol, even when it remained in effect, could not have transformed the ICJ's decisions into federal law. That result would encroach on the judicial system of the United States, and would elevate the power of the ICJ far beyond that provided by its statute and the U.N. Charter.

2. The ICJ's jurisdiction is limited to disputes between consenting nations, and its decisions are enforceable only through the Security Council.

The ICJ's decisions in *Avena* and *LaGrand* should not be applied by this Court in construing the Vienna Convention. The U.N. Charter and the ICJ's statute together delineate the scope of the ICJ's authority. The ICJ can hear only disputes between nations, and then only when those nations have consented to the ICJ's jurisdiction. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 34, 111, 59 Stat. 1055 (1945). ICJ decisions have binding force only between the parties, which must be sovereign nations, and only with respect to the particular dispute, *id.* art. 59. Indeed, the ICJ

statute specifies that, in all other instances, decisions of the court have "no binding force."[13] *Id.*

As a result, the ICJ cannot declare individual rights. Its decisions have no *res judicata* effect on disputes between individual persons. *See, e.g.*, *Socobel v. the Greek State*, 30 Avril 1950, 18 I.L.R. 3. ICJ judgments are "final and without appeal," but there is no rule regarding the application of those decisions before other tribunals. ICJ STATUTE art. 60.

Nor does the ICJ have direct enforcement powers. Instead, the Security Council enforces ICJ judgments in its discretion. Article 94 of the U.N. Charter explicitly provides that all disputes regarding ICJ decisions are to be referred to the U.N. Security Council. U.N. CHARTER art. 94. Thus, while there exists in principle an obligation to respect the ICJ's judgments, ultimate enforcement power is given not to the ICJ—which in effect has authority merely to make declarations that include the scope of damages resulting from a breach of international law—but to the Security Council which exercises the political and institutional authority to enforce the ICJ's decisions.

Significantly, no nation has ever inferred from Article 94(1) an obligation to enforce ICJ decisions as domestic law.[14] Indeed, this

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13. *Amici* ICJ Experts sole argument on this point is that the limitation does not apply to ICJ decisions because the ICJ itself has chosen to ignore it. ICJ Experts' *Amicus* Br. at 25-26.

14. Although many foreign cases are unreported, the only case the *amici* States' research has uncovered where a domestic court arguably applied an ICJ decision was in French-controlled Morocco (a legal entity no longer extant). *See Administration des Habous v. Deal*, 19 I.L.R. 342 (Morocco, Ct. App. Rabat. 1952)—a decision later rejected by a tribunal in French-controlled Tunisia, *see Mackay Radio & Tel. Co. v. Lal-la Fatma Bent si Moahamed el Khadar et al.*, 21 I.L.R. 136 (Tangier, Ct.

interpretation of the enforceability of the ICJ's decisions in U.S. courts was expressly rejected byt he D.C. Circuit in *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (CADC 1988) (Mikva, J.) (quoting *Diggs*, 555 F.2d, at 851 (CADC 1976)): "[T]he words of Article 94 'do not by their terms confer rights upon individual citizens; they call upon governments to take certain action.'" The ICJ Experts implicitly recognize this in their brief—rather than offer a legal basis for their argument, they rely upon their assessment of the United States' "economic and political interests." ICJ Experts *Amicus* Br. at 17-19 & n.30.

The ICJ's statute confirms that its decisions have not created rights judicially enforceable by individuals. The ICJ's decisions have binding force only between the parties and with respect to their particular case. See ICJ STATUTE art. 59. Only Nations may be parties in cases before the ICJ, *id.*, at art. 34, ¶1. The ICJ's decisions cannot, by its statute, apply in litigation regarding individuals. *See Comm. of United States Citizens Living in Nicaragua*, 859 F.2d, at 938 (U.N. Charter's provisions "make clear that the purpose of establishing the ICJ was to resolve disputes between national governments. We find in these clauses no intent to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government."); *see also Socobel*, 18 I.L.R. 3 (ICJ judgments cannot have *res judicata* effect in domestic courts because there is no identity of parties); *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum*, 13 F.R.D. 280, 290-91 (D.D.C. 1952) (refusing to give controlling effect to ICJ ruling).

App. Int'l Trib. 1954).

C. The Court Should Not Defer to the ICJ Out of Comity.

The dissent in *Medellin v. Dretke* suggested that an issue facing the Court was whether to accord judicial comity to the ICJ's decisions. 125 S.Ct. 2088, 2092-93 (2005) (per curiam). There is no basis for extending judicial comity to the ICJ: comity is not automatically extended to foreign tribunals *qua* tribunals; instead, it is a voluntary observance of the right of foreign nations to regulate their own affairs. *See Hilton v. Guyot*, 159 U.S. 113, 166 (1895). Applying comity is "a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another." *Somportex Ltd. v. Philadephia Chewing Gum Corp.*, 453 F.2d 435, 440 (CA3 1971). More specifically, "judicial comity" is a doctrine whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, *e.g.*, *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 423 (1866), as distinguished from "prescriptive comity," the respect sovereign nations afford each other by limiting the reach of their laws, *e.g.*, *F. Hoffman-La Roche v. Empagram S.A.*, 124 S.Ct. 2359, 2366-67 (2004); *see also* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §38 (1834) (distinguishing between the "comity of the courts" and the "comity of nations," and defining the latter as "the true foundation and extent of the obligation of the laws of one nation within the territories of another").

Neither form of comity should apply to the ICJ, which does not represent the political choices of a sovereign, but instead constitutes a dispute-resolution mechanism which ultimately culminates in a political—rather than a legal—resolution of diplomatic disputes. Judicial comity is simply inapposite to this case, because the interpretation of treaties is in the Court's own jurisdiction. A treaty is federal law. This Court has full competence to construe it according to its terms—and need not look to a foreign tribunal for guidance. *See, e.g.*, *El Al Israeli Airlines*, 525 U.S., at 167-68 (construing rule of decision provided in Warsaw Convention); *cf.*

Hagen v. Utah, 510 U.S. 399, 422-23 & n.1 (1994). The situation is completely different from extending comity to a foreign sovereign's application of *its own law* in its own territory. When "judicial comity" is applied to another nation's laws, the decision is made on the basis of equality between sovereign nations. *Republic of Austria v. Altmann*, 541 U.S. 677, 688-89 (2004) (discussing *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145-46 (1812)).

Additionally, although the ICJ's work often concerns treaties, it is tied to no political decision-making process—and to none of the accompanying political responsibilities—that would ensure that these "experts" had been given legitimate authority to impose their conclusions. *See Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2761 (2004) (the Court's authority to recognize legal standards arising in international law is limited to objectively established standards because the Court otherwise has no authority to adopt policy); *cf. id.*, at 2771-72 (Scalia, J. dissenting) (arguing that this standard is too lenient because it still gives courts authority to create law).

III. The Vienna Convention Does Not Preclude the Application of Virginia's Statutory Procedural-Default Requirements.

If the Court were to adopt a rule that Article 36 of the Vienna Convention both applies to criminal proceedings and is not subject to procedural default, it would be adopting a new rule of law. *Cf. Medellin*, 125 S.Ct., at 2091 (whether Article 36 bars procedural-default argument may constitute a "new rule").

Recognizing an exception to the procedural-default doctrine would be inconsistent with this Court's traditional recognition that it does not sit in review of the States' regulation of their own criminal-justice systems. The Court should not consider the policy arguments made by Petitioners and their *amici*—to do so would be to turn on its head the relationship between the federal and state

courts regarding criminal procedure, and the only basis for doing so would be a treaty that the Executive Branch believes should not be so applied.

A. Procedural Default Is an Adequate and Independent State Ground.

Procedural default is an adequate and independent ground support for the Virginia Supreme Court's judgment, *Wainwright v. Sykes*, 433 U.S. 72 (1977). The Court has already resolved that issue with regard to the Vienna Convention in *Breard*, holding that the procedural rules of the forum State, including rules on procedural default, govern implementation of the Vienna Convention. 523 U.S., at 375. The Court reasoned that this result was consistent with the background presumption of international law stating that the procedural rules of the forum State govern implementation of a treaty absent "a clear and express statement to the contrary." *Id.* Thus, Article 36 rights, if they exist, "shall be exercised in conformity with the laws and regulations of the receiving State," and Article 36(2) reinforced, rather than replaced, the procedural-default rule.

Bustillo relies on Article 36(2)'s requirement that laws of the forum state "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Bustillo Merits Br. at 36-38. But this reading presumes that the more general "full effect clause" overrides Article 36's more specific provision that the Convention will be applied "in conformity with" existing United States law. It cannot be that the more general provision creates a "clear and express statement" that the United States intended to change its own domestic laws by signing a treaty stating that the requirements of the Convention were to be enforced in compliance with existing law.

B. The Court Should Not Consider the Policy Arguments Advanced by Petitioners and their *Amici*.

The Court holds "no supervisory power over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Philips*, 455 U.S. 209, 221 (1982). Nonetheless, Bustillo argues that the Court should preclude the application of procedural default on policy grounds; in short, suggesting that the Court change U.S. law because it will make the treaty function more efficiently and because the Court should follow the ICJ's "guidance" regarding the interpretation of Article 36. Bustillo Merits Br. at 37-50. The Court should not consider these policy arguments, because they are within the Executive Branch's discretion.

Appending additional procedural requirements onto Article 36 would violate the Court's own precedent regarding procedural default. Procedural default prevents the subsequent enforcement of even constitutional rights, which can likewise be defaulted. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (procedural default applies to *Miranda* claims); *Sykes*, 434 U.S. at 87 (procedural default applies to voluntariness claims). The application of that rule to constitutional claims does not mean that the constitution is not given full effect under United States law; the possibility that procedural default will be applied to Vienna Convention claims, likewise, cannot be sufficient to demonstrate that Article 36 is not being given full effect.

To rule for Petitioners, the Court would have to disregard its own opinions regarding the procedural-default doctrine in the context of federal habeas claims. The procedural-default rule is designed in part to eliminate the tactical benefit that might be derived from the stratagem of "sandbagging" by a criminal defendant. *Sykes*, 433 U.S., at 89. Rejecting the prior test of *Fay v. Noia*, 372 U.S. 391 (1963), which allowed federal habeas review for any claim absent a knowing and deliberate waiver of the claim,

the Court emphasized the importance of applying the "cause"and "prejudice" standard in cases involving the application of the contemporaneous-objection rule. *Sykes*, 433 U.S., at 89.

A broad rule preventing procedural default of Vienna Convention claims would be even broader than the now-repudiated standard in *Fay v. Noia*. Even in the case of "deliberate bypass," Bustillo argues that Vienna Conventions claims should remain available. *See* Bustillo Merits Br. at 36-38. Indeed, in Bustillo's State habeas proceedings, Virginia cited the testimony of Bustillo's defense counsel, who stated that he *affirmatively chose* not to involve the consulate in Bustillo's case. J.A., at 235. The choice not to invoke the Vienna Convention is the source of the current dispute. As a general matter, Vienna Convention claims would present particularly likely candidates for sandbagging, to the significant detriment of the judicial process. For defendants from nations whose consulates provide little assistance to nationals facing criminal prosecution, the upside to raising the claim is nominal. But, if the claim cannot be waived, defendants could go to verdict, hope for acquittal, and, if convicted, assert the claim and get yet another bite at the apple. Moreover, if Petitioners prevail, the result would call into question the convictions and sentences of potentially tens of thousands of defendants, capital and non-capital, throughout all 50 States.

CONCLUSION

The Court should affirm the judgments of the Oregon and Virginia Supreme Courts.

Respectfully submitted,

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Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent,

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE ALLIANCE DEFENSE FUND, AS *AMICUS CURIAE*, SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is filed on behalf of the Alliance Defense Fund.[1]

The **ALLIANCE DEFENSE FUND** ("ADF") is a not-for-profit legal alliance organization. The ADF has 820 affiliated allied attorneys. Also allied with the ADF are numerous public interest law firms and organizations. In addition to engaging in direct litigation, the ADF provides litigation funding and training to organizations and attorneys protecting religious civil liberties.

ADF has advocated for rights of Americans under the United States Constitution in numerous significant cases throughout the United States, having been directly or indirectly involved in over 900 cases, including 42 cases before the United States Supreme Court.

The ADF works to preserve and protect religious liberty. It has particular knowledge helpful to the Court in this case concerning the social and legal impact of the authoritative use of international law.

CONSENT TO FILE BRIEF

Petitioners and Respondents, through their counsel of record, consented to the filing of all Briefs *Amicus Curiae* in this case. Their confirmations of global consent are on file with the Clerk of the Court.

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[1] In accordance with Supreme Court Rule 37(6), *amicus* certifies that this brief was authored entirely by Counsel of Record for *amicus* and that no part of the brief was authored by any attorney for a party. No person or entity other than *amicus curiae* or its counsel provided a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court, in resolving the instant issues, should not use International Court of Justice (ICJ) judgments as authoritative interpretative sources.

The ICJ lacked jurisdictional authority to discern individual rights judicially enforceable in American courts. In addition to lacking authority to render its judgment, a substantial amount of legal authority suggests the ICJ incorrectly concluded the Treaty creates individual rights enforceable in American Courts. Furthermore, authoritatively adopting the ICJ judgments will create an irreconcilable conflict with existing federal statutes and well-established constitutional doctrines of criminal procedure.

By asking this Court to authoritatively use the ICJ judgments in interpreting the Treaty, Petitioners seek to legitimize holdings of that tribunal as the rule of decision for American courts. Given that the politically accountable branches of the American government hold a very different understanding of the Treaty's terms than the ICJ, heeding Petitioner's request is an especially inappropriate course for this Court.

To impose the ICJ's interpretation upon the United States subordinates and alters the United States Constitution. It deprives the Executive Branch of its right, under the U.N. Charter, to exercise discretion in choosing how to respond to a judgment of the ICJ. It also deprives Congress of its constitutional authority to legislate. By denying the politically accountable branches of this Nation the ability to carry out their respective roles under the Constitution, it surrenders sovereignty of the United States to an unelected

international body. Neither the United States Constitution, nor the natural law of nations on which it was founded, permit such an extraordinary result.

Amicus curiae, therefore, urges this Court, not to rely upon the *LaGrand* and *Avena* decisions as authoritative interpretative sources.

ARGUMENT

Amicus curiae discuss why this Court should not use International Court of Justice (ICJ) judgments as authoritative interpretative sources in resolving the instant issues.

THIS COURT SHOULD NOT RELY UPON JUDGMENTS OF THE INTERNATIONAL COURT OF JUSTICE

Petitioners suggest it is proper for this Court, in resolving whether the Vienna Convention creates judicially enforceable individual rights, to rely on judgments rendered by the ICJ. (Pet'r. Br. Bustillo i, 29-31; Sanchez-Llamas i, 26-28). Petitioners are wrong.

A. THE INTERNATIONAL COURT OF JUSTICE (ICJ) DECISIONS IN *LaGrande* AND *Avena* ARE NOT ENTITLED TO RECOGNITION AND ARE NOT CONTROLLING

The United Nations adopted the Vienna Convention on Consular Relations and Optional Protocols on April 24, 1963. Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, art. 36(2), 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention or "Treaty"]. The United States Senate ratified the Vienna Convention and the Optional Protocol concerning Compulsory Settlement of Disputes[2] on October 22, 1969. 115 Cong. Rec. 30,997 (1969).

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[2] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, art. 1, 21 U.S.T. 325, 596 U.N.T.S. 487, [hereinafter Optional Protocol].

This Court has stated that it "should give respectful consideration to the interpretation of an international treaty rendered by an international court *with jurisdiction to interpret* [the treaty]" (emphasis added). *Breard v. Green*, 523 U.S. 371, 375 (1998). For the reasons discussed in this brief, however, the ICJ lacked jurisdictional authority to discern individual rights judicially enforceable in American courts. This Court should not, therefore, authoritatively use the *LaGrand* or *Avena* ICJ judgments as authoritative interpretative sources in resolving the instant issues.

In the *LaGrand* and *Avena* cases, signatory nations to the Vienna Convention brought actions against the United States in the International Court of Justice. Relying on the Optional Protocol for jurisdiction, the ICJ entered judgments ultimately holding that: (1) the Vienna Convention establishes individual rights for foreign nationals; (2) these individual rights are to be judicially enforced in American courts; and (3) American constitutional and statutory procedural default rules cannot bar judicial review of a foreign national's Vienna Convention Claim in American courts. *See Avena and Other Mexican Nationals (Mex. v. U.S.)* 2004 I.C.J. 1 (Mar. 31); *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27).

The ICJ in *Avena* made clear it intended its judgment to broadly apply as the rule of decision in all cases involving similarly situated foreign nationals in the United States. *Avena* at para. 151. The ICJ's position, and Petitioners' desire for this Court to adopt it in the instant case, must not stand. Given that the politically accountable branches of the American government hold a very different understanding of the Treaty's terms than the ICJ, heeding Petitioner's request is an especially inappropriate course for this Court.

1. The ICJ lacked authority under the Optional Protocol to discern individual rights judicially enforceable in American courts.

Petitioners contend the Optional Protocol to the Vienna Convention provided the ICJ with jurisdiction to discern individual rights and prescribe that such rights be judicially enforceable in American courts. (Pet'r. Br. Bustillo 31; Sanchez-Llamas 26-27). The Optional Protocol actually states much less, merely providing that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." (Optional Protocol).

Article 34 of the ICJ Statute provides that "[o]nly *states* may be parties in cases before the court." Statute of the International Court of Justice, 59 Stat. 1055 (emphasis added). Article 59 of the ICJ Statute further indicates that "the decision of the court has no binding force *except between the parties* and in respect to that particular case." *Id.* (emphasis added). Thus, the ICJ has no power to announce the existence of individual rights, and its judgments can have no effect on a dispute involving an individual.

Moreover, the text of the Optional Protocol negates Petitioners' view that the Optional Protocol empowered the ICJ to create judicially enforceable individual rights. In this regard, the text in Article I of the Optional Protocol only permits a signatory State to participate in a dispute before the ICJ. (Optional Protocol). This jurisdictional limitation expressly precludes individuals from asserting rights of their own, or in any way participating in a case before the ICJ. The ICJ certainly, therefore, lacked authority under the

Protocol to divine individual rights from the shadows of the Vienna Convention during such a proceeding.

Moreover, nothing credible in the record suggests that the President's negotiation and the Senate's ratification of the Optional Protocol included surrendering the sovereignty of the United States to the ICJ. To be sure, as long as the United States remained a party to the Protocol, the politically accountable branches agreed to permit the ICJ to hear "[d]isputes arising out of the interpretation or application of the Convention." *Id.* Nothing in this plain language, however, authorized the ICJ to create individual rights under the treaty, or prescribe that such rights be judicially enforceable in American courts. Likewise, nothing in the plain language of the Optional Protocol authorized the ICJ to broadly extend this ruling to all consular notification cases in the United States.

Furthermore, Article 94 of the United Nations Charter provides the basis of a signatory State's obligation to comply with a judgment of the ICJ – not the Optional Protocol. U.N. Charter art. 94, para. 1, 59 Stat. 1051. In this regard Article 94 provides that an individual member of the United Nations must "undertake[] to comply with the decision of the International Court of Justice in any case to which it is a party." *Id.* The position of the United States is that the words, *undertakes to comply*

> [do] not constitute an acknowledgment that an ICJ decision will have immediate legal effect in the courts of U.N. members. Instead, it constitutes a commitment on the part of the U.N. members to take future action through their political branches to comply with an ICJ decision. U.S. Br. as *Amicus Curiae* at 34,

Medellin v. Dretke, 125 S.Ct. 2088 (2005) (No. 04-5928).

Thus, the source for this Nation's obligation to comply with an ICJ judgment is the U.N. Charter; and under that Charter, the fulfillment of Article 36 Vienna Convention obligations rests with the politically accountable branches of the United States, not the judiciary.

Since the U.N. Charter by design lacks specificity as to how a signatory State should comply with a judgment by the ICJ, it is fair to infer that the Charter vested the politically accountable branches of a signatory State with discretion in deciding how the nation will comply. Moreover, under the U.N. Charter, enforcement of a signatory nation's obligation to comply falls to the U.N. Security Council, not the ICJ. U.N. Charter Art. 94, para. 2. Unilateral dictates by the ICJ requiring compliance through immediate judicial review by a signatory State, deprives the politically accountable branches of this Nation of the right to exercise discretion pursuant to the U.N. Charter. Indeed, as far as your *Amici* is aware, no existing signatory State understands Article 94 of the Charter as imposing a requirement of compliance through the signatory nation's judiciary, independent of the politically accountable branches of government. *See Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (holding that Article 94 of the U.N. Charter "does not confer rights on private individuals"). This is because Article 94 of the U.N. Charter envisaged situations where the politically accountable branches of a signatory State might exercise discretion not to comply with a judgment of the ICJ; in such a situation seeking remedial satisfaction in the UN Security Council is the only alternative. U.N. Charter Art. 94, para. 2

Thus, the ICJ's judgments calling for enforcement of a Treaty obligation, via immediate judicial review in the signatory state, are acutely inconsistent with the enforcement process in the U.N. Charter. Indeed, the ICJ's position unacceptably renders Article 94 of the U.N. Charter meaningless.

Enforcement of treaty provisions does not fall within the purview of international tribunals. This is because "[a] treaty is primarily a compact between independent nations." *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 598 (1884). Thus, a treaty depends "on the interest and honor of the governments which are parties to it" for enforcement. *Id.* In the *Avena* case, the President chose to comply with the ICJ's judgment "by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005). The President grounded his compliance not in any authority of the ICJ, but in the executive power of Article II of the United States Constitution. *Id.*

At the same time the President complied with the judgment in the *Avena* case, the President chose to protect the Nation from future judgments based on *Avena's* faulty legal principles. The President accomplished this purpose by withdrawing the United States from the Optional Protocol. *See* Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (March 7, 2005) (notifying the Secretary-General of the United States withdrawal from the Optional Protocol) [hereinafter *U.S. Letter of Rescission*].

The President's rescission from the Optional Protocol powerfully demonstrates Executive Branch intent not to

surrender sovereignty to an international tribunal (i.e., by subjecting itself to erroneous judgments improperly rendered without authority).

2. The ICJ Incorrectly Concluded that the Treaty Creates Individual Rights Judicially Enforceable in American Courts

In addition to lacking authority to render its judgment, significant support exists suggesting the ICJ was incorrect in concluding that the Treaty creates individual rights judicially enforceable in American Courts. To ascertain whether a treaty confers a right on individuals, this Court looks to the text of a treaty, just as it would with a statute. *U.S. v. Alvarez-Machain*, 504 U.S. 655, 663 (1992). Thus, a court construing treaty provisions must do so in accordance with established rules of statutory construction. *Id.* In this regard, this Court looks to the plain language of the treaty. *Id.*

It is certainly questionable whether the ICJ, in reaching its conclusions, evaluated the plain language of the Treaty. If the purpose of the Treaty is, as the ICJ suggests, creation of judicially enforceable individual rights, then key portions of the Treaty's text are a meaningless nullity. For example, the Treaty Preamble plainly states that the purpose of the privileges and immunities in the Treaty is "[to] contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems . . . ." Vienna Convention, Preamble. Creating judicially enforceable individual rights out the shadows of the Treaty, has nothing to do with developing friendly relations among nations with very different systems. Neither does coercing such judicially enforceable individual rights on a signatory State. Indeed, the recent rescission of the United States as a signatory State to the Optional Protocol,

demonstrates just how incompatible the ICJ's position is with the actual purpose of facilitating diplomatic relations expressed in the text.

Moreover, the plain language of the Treaty Preamble goes on to expressly state "the purpose of such privileges and immunities *is not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States." *Id.* (emphasis added).

Article 36 is located in Chapter II of the Treaty and is entitled "Facilities, Privileges and Immunities Relating to Consular Posts." Vienna Convention, Chapter II.[3] Article 36 states the obligations of signatory nations relevant to Petitioners' claims in this case. On their face, those provisions relate to facilitating consular activity in receiving states and seem, therefore, to confirm the general purpose stated in the Preamble.[4] Significantly, Article 36 resides in

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[3] The title of Chapter II of the Treaty is: "Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and Other members of a Consular Post." Vienna Convention, Chapter II.

[4] The pertinent part of Article 36 provides: 1. *With a view to facilitating the exercise of consular functions relating to nationals of the sending State*:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have

the section relating to consular posts, and not the section concerning facilities, privileges and immunities of individuals (i.e., members of the consular post) (compare Vienna Convention, Chapter II, sections I and II).

The ratification history of the Vienna Convention likewise corroborates the view that the Treaty did not create individual rights judicially enforceable in American courts. State Department testimony during ratification hearings provided that the Treaty "does not have the effect of overcoming federal or State law beyond the scope long authorized in existing consular conventions." *See U.S. v. Li*, 206 F.3d 56, 64 (1st Cir. 2000) (en banc) (referring to State Department statements).

During the ratification process, the State Department's testimony furthered emphasized that the Treaty's purpose was "not to benefit individuals." Sen. Doc Exec. E, 91st Cong. 1st Sess. (1969) (referring to the Treaty Preamble). When the Senate Committee on Foreign Relations transmitted the Treaty to the full Senate for ratification, the Committee Chair included a short report; this report indicated that the Committee believed that the Treaty "does not change or affect present U.S. laws or practice." *Id.*

Several federal circuits and state courts have concluded that the Vienna Convention does not create individual rights that a defendant may assert in a criminal proceeding. *See, e.g., U.S. v. Duarte-Acero*, 296 F.3d 1277,

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the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (emphasis added).

1281-82 (11th Cir.); *U.S. v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001); *U.S. v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001); *U.S. v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir.); *Li*, 206 F.3d at 60-66 (1st Cir. 2000) (en banc); *see also Bell v. Commonwealth*, 563 S.E.2d 695, 706 (Va. 2002); *State v. Navarro*, 659 N.W.2d 487, 493 (Wis. Ct. App. 2002); *State v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001).

Additionally, the President's removal of the United States, as a signatory State to the Optional Protocol, confirms the Executive Branch view that the Vienna Convention does not create individual rights judicially enforceable in American courts. Indeed, the Executive Branch "has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right." U.S. Brief as *Amicus Curiae* at 22-23, *Medellin v Dretke* 125 S.Ct. 2088 (2005) (No. 04-5928); U.S. Brief at 18-23, *Republic of Paraguay v. Gilmore*, 523 U.S. 1068 (1998) (No. 97-1390).

The State Department, in the *Li* case, advised that the Treaty established rights and obligations between signatory nations, not individual rights. *Li*, 206 F.3d at 63 (citing to State Department statements). Other State Department statements as early as 1970 provided that the Treaty would not require significant departures from existing practice. *Id.* at 64. Finally, the State Department expressly indicated that: "The [only] remedies for failures of consular notification under the [Vienna convention] are diplomatic, political, or exist between states under international law." *Id.* at 63. Because the President serves as the "sole organ of the federal government in the field of international relations," *U.S. v. Curtiss-Wright*, 299 U.S. 304, 320 (1936), this Court should give the Executive Branch's understanding of the Treaty in this case "great weight." *U.S. v. Stuart*, 489 U.S. 353, 369 (1989).

B. AUTHORITATIVELY ADOPTING THE ICJ JUDGMENT CREATES AN IRRECONCILABLE CONFLICT WITH EXISTING FEDERAL STATUTES AND WELL ESTABLISHED CONSTITUTIONAL DOCTRINES OF CRIMINAL PROCEDURE

The ICJ decision creating individual rights, and prescribing judicial enforcement of such rights in American courts, failed to consider the federal nature of our Nation's constitutional structure. The Constitution's Supremacy Clause provides:

> *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made*, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2 (emphasis added).

Petitioner Bustillo contends that ICJ's version of the Treaty is the Supreme Law of the Land. (Pet'r. Bustillo Brief at 16-20, 29-31, 45). Citing the Supremacy Clause, he argues the ICJ's version of the Treaty (creating judicially enforceable rights without regard to procedural default rules) must prevail over a state habeas statute barring claims, if not first raised in the state trial court. *Id.* Adopting the ICJ judgment as the authoritative "rule of decision" in state habeas cases, however, would create an irreconcilable conflict with existing federal habeas statutes and firmly fixed constitutional doctrines of criminal procedure involving procedural default. It is this irreconcilable conflict to which we now turn.

"[A]bsent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Breard,* 523 U.S. at 375 (1998) (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988)); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988); and *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 539 (1987)).

Indeed, "the Vienna Convention itself" permits and embodies American state and federal law's procedural default principle by expressly providing that Convention rights "'shall be exercised in conformity with the laws and regulations of the receiving State'" so long as "'said laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended.'" *Breard,* 523 U.S. at 375 (citing and quoting Vienna Convention, *supra*, 21 U.S.T. at 101).

In *Breard v. Greene,* this Court held that the procedural default rules, developed under the United States Constitution, accomplish those purposes–and that Vienna Convention claims, like Constitutional claims, can be procedurally defaulted. 523 U.S. at 375. The now axiomatic rule developed by this Court under the United States Constitution is that claims of error in criminal proceedings "must first be raised in state court in order to form the basis for relief in habeas," whether in capital or other cases. *Breard*, 532 U.S. at 375 (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)).[5]

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[5] Several federal and state courts properly relied on *Breard* to require (as a prerequisite to obtaining review) a showing of prejudice, such as proof that the violations impacted trial or deprived a defendant of a constitutional right. *See, e.g., U.S. v. Ortiz*, 315 F.3d 873, 878 (8th Cir. 2002); *U.S. v. Minjares-Alvarez*, 264 F.3d 980, 986-87 (10th Cir. 2001); *U.S. v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000); *U.S. v.*

Congress reinforced those procedural default rules when, subsequent to the ratification of the Treaty, it enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, Apr. 24, 1996, 110 Stat. 1214. *Breard,* 532 U.S. at 376. Under this statute, a federal habeas petitioner, claiming his incarceration violates "treaties of the United States," generally is not entitled to an evidentiary hearing where he "fail[s] to develop the factual basis of [the] claim in State court proceedings." 28 U.S.C. § 2254(a), (e)(2) (1994).

Although Petitioner is correct that treaties are the Supreme Law of the Land, so, too, is the Constitution itself, as well as an Act of Congress. *Breard,* 523 U.S. at 376. Moreover, this Court has repeatedly held "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Id.* at 376 (citing and quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)) (citing also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating when treaty and federal statute conflict, "the one last in date will control the other")).

While the Vienna Convention was adopted in 1969, Congress subsequently enacted, and the President signed, the AEDPA in 1996. A petitioner's "ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be." *Breard,* 523 U.S. at 376. No substantial, constitutional basis exists on which to alter it. *See* Sandra Day O'Connor, *Federalism of*

Cordoba-Mosquera, 212 F.3d 1194, 1196 (11th Cir. 2000); *U.S. v. Pagan*, 196 F.3d 884, 890 (7th Cir. 1999); *U.S. v. Ademaj*, 170 F.3d 58, 67-68 (1st Cir. 1999).

Free Nations, in International Law Decisions in National Courts 13, 19 (Thomas M. Franck & Gregory H. Fox eds., 1996) (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (stating that "the vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question") (noting "Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power. . . .'")).

Thus, the United States Constitution and Acts of Congress (as interpreted by decisions of this Supreme Court and enacted subsequent to the ratification of the Vienna Convention) have Supremacy over the contrary decisions of the ICJ (creating judicially enforceable rights without regard to procedural default rules).

Because Petitioner Bustillo's Vienna Convention claim was procedurally defaulted under a state statute and not the AEDPA, however, he contends that ICJ's version of the Treaty is the Supreme Law of the Land. (Pet'r. Br. Bustillo at 16-20, 29-31, 45). Bustillo, therefore, argues that under the Supremacy Clause, the ICJ's version of the Treaty must prevail over state procedural default rules (barring claims if not first raised in state trial court). *Id.* at 16-20, 29-31, 45. Bustillo's proposed resolution therefore, creates an irreconcilable conflict with the existing Federal AEDPA statute and the well established constitutional doctrine of criminal procedure concerning procedural default.[6]

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[6] Bustillo's position lacks merit. Although the ICJ judgments come later in time than the AEDPA, such decisions do not constitute a superseding subsequent enactment since they merely involve the review by an international tribunal of a prior enactment. Moreover, while the Supremacy Clause may include treaties, it nowhere encompasses a mere

Petitioners' briefs either fail to address this problem or dismiss it as irrelevant. See, e.g., Pet'r Br. Bustillo at 45.

Following Petitioners' proposed course would improperly allow views of an international court, lacking entitlement to recognition, to prevail over those of our own citizens. Any decision by this Court concerning the continued constitutional efficacy of state procedural default rules should, therefore, consider how the rule of decision rendered will affect similar procedural default rules in future *federal* habeas cases.

We also note that implementing the ICJ version of the Treaty unfairly gives charged foreign nationals more rights than charged American citizens on habeas. Indeed, under the ICJ version of the Treaty, nothing prevents a charged foreign national from strategically holding back any Vienna Convention claim until after trial (with or without the effective assistance of competent counsel).

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opinion by the ICJ, since such an opinion is not a *treaty*. U.S. Const. art. VI, cl.2.

C. DEFERRING TO THE ICJ DECISIONS FOR THE RULE OF DECISION IN THIS CASE SURRENDERS AMERICAN SOVEREIGNTY AND HAS POTENTIAL TO CREATE A CONSTITUTIONAL CRISIS OF EPIC PROPORTIONS.

The American people trust their courts to faithfully interpret the expression of the popular American will and resolve their disputes fairly under the rule of law. It is this trust of the people, standing alone, that gives legitimacy to a federal court's power of judicial review. Thus, in a constitutional republic dividing power between an elected executive, an elected legislature, and an independent judiciary, the continued legitimacy of democratic institutions rests in part on the unelected judiciary not usurping the power of politically accountable branches of government.

In this regard, the facts of this case create the potential for a constitutional crisis of epic proportions. Here, Petitioners ask an unelected Supreme Court to reject well-established American constitutional and statutory law as the rule of decision in this case. In its place, Petitioners suggest that this Court deem as the Supreme Law of this Land, an unelected foreign court's judicial promulgation. Such a course surrenders the sovereignty of the United States to the International Court of Justice and interferes with the right of politically accountable branches to govern under the rule of law.

Nowhere in the history of our nation has a court of justice attempted to assume so much power in American government as the ICJ did in the *La Grand* and *Avena* judgments. When this Court decides whether to rely on the judgments of the ICJ here, *amicus* asks this Court to consider that no politically accountable President appointed anyone on that tribunal. Likewise, no politically accountable Senator voted to confirm anyone on that tribunal. By asking this

Court to authoritatively use the ICJ judgments in interpreting the Treaty in the instant case, Petitioners seek to legitimize it as the rule of decision for American courts. This approach, however, extra-constitutionally allows an international body to shape law binding the American people. In this regard, Petitioners ask this Court to do nothing less than to surrender American sovereignty.

The use of foreign authorities strikes at the founding bargain made by the American people. The American people at no time subordinated themselves to an international sovereign on domestic issues and have fought wars to avoid being subordinated to European or foreign authorities.

Petitioners cite to the Federalist Papers, and other constitutional history, to justify their desire for this Court to rely upon the ICJ judgments creating individual rights judicially enforceable in American courts. *See* Pet. Br. Bustillo at 16-17; Sanchez-Llamas at 35-36. Reliance on foreign precedents, however, actually conflicts with the structure and history of the U.S. Constitution.

James Madison expressed his wonder at the considerable extent to which the Philadelphia Convention reached agreement on the Constitution with these words: "It is impossible for the man of pious reflection not to perceive in it, a finger of that Almighty hand which has been so frequently and signally extended to our belief in the critical stages of the revolution." *The Federalist* No. 37 at 236-238 (James Madison) (J.E. Cooke ed., 1961). Indeed, the adoption of the Constitution signified the people's acceptance of a moral view of government. The natural sovereign authority the Constitution affords to these United States, as a part of that moral view, should not be disturbed.

Indeed, the Constitution gives no indication that the people intended under these truths to grant ultimate power to those who would divine law from the statements of non-representative international bodies. The people ceded only those natural rights which any people must cede so as to vest a necessary government with adequate powers. *The Federalist* No. 2, at 8 (John Jay) (J.E. Cooke ed., 1961). The Founders further recognized those powers were limited by "the transcendent law of nature and of nature's God . . . to which all such institutions must be sacrificed," *The Federalist* No. 43, at 297 (James Madison) (J.E. Cooke ed., 1961).

Thus, it is apparent throughout *The Federalist* that the United States Constitution was written with a particular view in mind of ordinary principles of causality – that certain motives and opportunities of constituent interests ought (in view of the nature of man) to be treated by certain forms of government. The judicial submission of the American people to an international rule of decision, to which neither political branch has on its own submitted, is not part of those Constitutional principles.

The perils of the judiciary submitting the United States to the authority of international norms which the political branches have not adopted or authorized are many and well-documented. World judicial systems are immensely varied, creating "promiscuous opportunity" to cite authority for whatever propositions the courts wish. Richard Posner, *No Thanks, We Already Have Our Own Laws,* Aug. 2004 Legal Affairs 40, 41; John Leo, *Creeping Transnationalism*, U.S. News & World Report, July 21, 2003, at 58 (observing a problem with judges defying American law by spotting "emerging world consensus"); Donald E. Childress, III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 Duke L.J. 193, 217, 219-220 (2003)

(proposing that international comparative analysis overturns American legal culture and constitutionalism).

Citation of foreign decisions becomes "one more form of judicial fig-leafing" of which we have too much already, when the real influences on judicial decision-making have nothing whatever to do with the study of foreign decisions. Posner, *supra,* at 42. Indeed, foreign decisions "emerge from a complex socio-historical-politico-institutional background" of which federal judges "are almost entirely ignorant." *Id.* Courts are not all pursuing the same enterprise. A federal court interpreting the United States Constitution may not be doing anything like that which a foreign court does interpreting different documents. *See* Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 Am. J. Int'l L. 69, 73 (2004) (noting that this practice threatens to undermine constitutional law).[7] American constitutional law and international human rights law emerge from distinctly different source material. *See* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas*, 44 Va. J. Int'l L. 913, 919 (2004).

For instance, relying on foreign authority to declare new fundamental constitutional rights shatters prior prudential constraints on substantive due process theories. *Id.* at 925 (citing Robert C. Post, *Forward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L.

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[7] Professor Ramsey gives the example that the *Dudgeon* European court which this Court cited in *Lawrence v. Texas*, 539 U.S. 558 (2003), was deciding whether an anti-sodomy provision was "necessary" within the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms, whereas this Court in *Lawrence* was deciding whether Texas's anti-sodomy law was "reasonable" under the Constitution. Ramsey, supra. at 73-74.

Rev. 4, 96 (2003)). This Court has clearly, and repeatedly, held that treaties cannot supersede individual rights protected under the United States Constitution. *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988) (upholding First Amendment freedoms); *Reid v. Covert*, 354 U.S. 1 (1957) (upholding Sixth Amendment rights). If this Court cedes part of the Constitution in the instant case, it might expect new petitioners before this Court citing international norms to stifle free expression of religious views, and the free exercise of religion in general.

Citation of foreign decisions certainly is counter to popular rule by the people and undemocratic. Posner, *supra* at 42; Roger P. Alford, *Misusing International Sources to Interpret the Constitution,* 98 Am. J. Int'l L. 57 (2004). In fact, citation of foreign decisions is often an express strategy of law professors and interest groups to find "a more sympathetic set of interpretive sources than existed domestically." Ramsey, *supra* at 70 (citing Harold H. Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. Davis L. Rev. 1085, 1109-1129 (2002)).

Because the Court does not have the institutional resources and skills to engage in its own comparative and empirical analysis of international sources, it relies unduly on misshapen advocacy. *See* Alford, *Misusing International Sources*, *supra* at 64-65. Selection of foreign sources then becomes non-empirical and even arbitrary except in relationship to the desired outcome.[8] Ramsey, *supra* at 72-73. Moreover, the choice of issues on which to employ comparativism is itself unprincipled and, therefore, seems directed to the Court's ends. *See* Alford, *Misusing International Sources*, *supra* at 67-68 (2004) (citing Mary

[8] Professor Ramsey queries why the Robinson brief on which this Court relied in *Lawrence* cited the law of Israel rather than India, for instance. *Id.* at 73.

Ann Glendon, *Abortion and Divorce in Western Law* 24-25, 145-54 (1987) (noting that, comparatively speaking, the United States' abortion policy is singular among all of the world's countries)). "Gone are decisions that turn on objective facts or value judgments of others. What matters is the Court's own conception of liberty."[9] Alford, *Federal Courts, supra* at 925. Enumeration of rights created by international tribunals not only abandons the Constitution's text and history but also the experience and history of the Nation. Alford, *Federal Courts, supra* at 926.

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[9] Professor Alford also mentions Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961), writing of a jurisprudence "where judges . . . felt free to roam where unguided speculation might take them." Alford, *Federal Courts, supra* at 925 n.78.

CONCLUSION

By the adoption of the Constitution the American people ceded certain of their inviolable natural rights to the government. The people did not, however, cede those rights to foreign judges exercising authority inconsistent with that authorized by the people's representatives and the Constitution itself.

Here the ICJ had no authority to discern individual rights judicially enforceable in American courts. Yet, in the face of substantial contrary legal authority, the ICJ did so. This Court should, therefore, reject Petitioners' invitation to anoint the ICJ's judicial promulgation as the Supreme Law of this Land. Moreover, authoritatively adopting the ICJ judgments will create an irreconcilable conflict with existing federal statutes and well established constitutional doctrines of criminal procedure. Given that the politically accountable branches of the American government hold a very different understanding of the Treaty's terms than the ICJ, heeding Petitioner's request is an especially inappropriate course for this Court.

To impose the ICJ's interpretation on the United States subordinates and alters the United States Constitution. It deprives the Executive Branch of its right, under the U.N. Charter, to exercise discretion in choosing how to respond to a judgment of the ICJ, and deprives Congress of its constitutional authority to legislate. By denying the politically accountable branches of this Nation the ability to carry out their respective roles under the Constitution, it also surrenders the sovereignty of the United States to an unelected international body. Neither the United States Constitution, nor the natural law of nations on which it was founded, permit such an extraordinary result.

For these reasons, your *amicus curiae* urges this Court, not to authoritatively rely upon the *LaGrand* and *Avena* decisions as interpretative sources.

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Nos. 04-10566 & 05-51

IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,
Petitioner,

v.

OREGON,
Respondent.

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the Supreme Courts of the State of Oregon and Commonwealth of Virginia

BRIEF OF AMBASSADOR L. BRUCE LAINGEN *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are either U.S. citizens who have benefited from consular assistance abroad or suffered in its absence; attorneys or diplomats familiar with the importance of consular assistance; or organizations dedicated to the interests of U.S. citizens abroad.

Ambassador L. Bruce Laingen served in the United States Foreign Service from 1949 to 1987. His tours of service included assignments in Germany, Iran, Pakistan, and Afghanistan. He served as U.S. Ambassador to Malta from 1977-1979. In mid-1979, he returned to Iran for a second term as Chargé d'Affaires of the American Embassy before being held hostage in the Iran Hostage Crisis from November 4, 1979 to January 20, 1981. During the Hostage Crisis, the United States sought and secured a judgment against Iran from the International Court of Justice based on Iran's violation of the Vienna Convention on Consular Relations. Ambassador Laingen holds the Award for Valor from the Department of State, as well as the Distinguished Public Service Medal from the Department of Defense.

Thomas R. Dawson served as a Peace Corps volunteer in Iran in 1966. On the way to attending a Peace Corps Conference in September of that year, Mr. Dawson and a fellow volunteer decided to explore the shore of the Caspian Sea in Astara, Iran, which was close to Soviet territory. Mr. Dawson unwittingly crossed over the unmarked border into Soviet territory, and he was promptly

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[1] Counsel for all parties have consented in writing to the filing of this brief; those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to the preparation and submission of this brief.

captured by armed soldiers, taken into custody, and interrogated for several days. He repeatedly pleaded with his captors to allow him contact with the American consulate, but to no avail, until the tenth day of his captivity when he was finally allowed contact with American officials. Mr. Dawson was eventually released to Iranian authorities, who delivered him to the American embassy in Tehran. Mr. Dawson completed his service in the Peace Corps in Micronesia, without further incident, and lives, with his wife, on Kent Island in Maryland. He owns and operates an art gallery in Annapolis.

Billy Hayes is a filmmaker, producer and writer based in Los Angeles, California. Mr. Hayes spent five years in a Turkish prison during the 1970s, an ordeal described in his book, *Midnight Express*, which was made into a feature motion picture by the same name. Prompt notification of the U.S. Consulate ensured that Mr. Hayes was able to retain a lawyer, while regular consular visits throughout his incarceration provided an essential and reliable link to the outside world.

Richard Atkins practices law in Philadelphia, Pennsylvania, and has specialized for more than twenty years in assisting American citizens who run afoul of the law in foreign countries. He has testified before the Senate Foreign Relations Committee on international prisoner transfer agreements and wrote a guide to prisoner transfer treaties for the United Nations. Approximately a thousand incarcerated Americans abroad have been freed or returned with his assistance.

William D. Rogers served as Assistant Secretary of State for Inter-American Affairs from 1974-1976, and Under Secretary of State for Economic Affairs from 1976-1977. During his lengthy career as a diplomat, he played a key role in Secretary of State Kissinger's negotiations to end white

rule in Rhodesia (now Zimbabwe), participated in the final Panama Canal Treaty negotiations, was special emissary for President Carter to El Salvador in 1980, co-chaired the Bilateral Commission on the Future of U.S. Mexican Relations, and was Senior Counsel to the National Bipartisan Commission on Central America. He has also served as President of the Center for Inter-American Relations in New York, and as President of the American Society of International Law.

Founded in Geneva in 1978, **American Citizens Abroad** (ACA) is a non-profit, non-partisan organization dedicated to serving and defending the interests of U.S. citizens living outside the United States. ACA works closely to assist the U.S. Government in developing cohesive national policies dealing with Americans overseas. The organization has members in over 90 countries worldwide.

Established in 1973, the **Association of Americans Resident Overseas** (AARO) is a volunteer, non-partisan service organization representing the interests of more than 4.1 million Americans living and working abroad. Its mission is to ensure that Americans resident overseas are guaranteed the same rights and privileges as their U.S. counterparts. AARO has worked to change U.S. laws and policies so that Americans abroad receive the same benefits and protection as citizens in the United States.

Founded in 1931, the **Federation of American Women's Clubs Overseas** (FAWCO) is a non-partisan network of 78 independent organizations in 37 countries, with over 15,000 members. FAWCO is a non-profit U.S. corporation and a recognized NGO with special consultative status to the UN Economic and Social Council. Among its stated purposes is to defend the rights of all Americans overseas.

While *amici* take no position on the ultimate merits of the underlying criminal cases, they urge that the failure by the lower courts to give a vigorous and robust scope to the protections of the Vienna Convention on Consular Relations will ultimately, and inevitably, endanger the welfare of United States citizens abroad.

SUMMARY OF ARGUMENT

Every year, a significant number of United States citizens traveling or living overseas find themselves ensnared in the criminal justice system of a foreign government. Consular assistance provides a vital service to these Americans, maintaining a desperately needed link to the outside world, and helping them navigate and understand an unfamiliar, and perhaps hostile, legal system.

The United States played a leading role in creating Article 36 of the Vienna Convention on Consular Relations, which ensures that consular officers will be allowed to perform this important service. Article 36 depends in the first instance on the right of an individual detainee to be notified of the right to seek consular assistance. It obligates Member States to notify foreign detainees of that right, and to permit their consuls to have access to and to assist the detainees. But if officials in this country fail to provide foreign nationals with the full benefit of the Article 36 provisions on consular assistance, beginning with the individual detainee's right of notice, it is inevitable that U.S. citizens abroad will soon suffer a similar, reciprocal fate. Indeed, nothing presents a greater threat to consular assistance to Americans abroad than the failure to respect foreign nationals' reciprocal right to assistance in this country.

The United States also played a leading role in drafting the Optional Protocol Concerning the Compulsory

Settlement of Disputes, which established the compulsory jurisdiction of the International Court of Justice in disputes involving parties to the Convention. The United States has frequently recognized the International Court of Justice (ICJ) as a proper forum to adjudicate disputes between states. In fact, it has invoked the jurisdiction of the World Court more often than any country in the world. Of particular significance to this dispute, the United States brought an action in 1979, following the Tehran hostage crisis. The action challenged, *inter alia*, Iran's failure to comply with Article 36 of the Convention.

The failure by the lower courts to give full effect to the provisions of Article 36 – including in particular, the detainee's right of notice – is inconsistent with the leading role of the United States in creating the Convention. It is also at odds with its frequent resort to the jurisdiction of the ICJ, which has recognized the notice right. More ominously, if the judgment below is allowed to stand, it is inevitable that U.S. citizens abroad will soon suffer in kind.

ARGUMENT

I.

The United States Played A Leading Role In Developing The Legal Protections Provided By Both The Vienna Convention And the Optional Protocol

The United States has long recognized what can scarcely be gainsaid: the Vienna Convention on Consular Relations (Convention)[2] provides vital safeguards to persons imprisoned by a contracting State.[3] But equally clear, and no

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[2] April 24, 1963, 21 U.S.T. 77, 596 UNTS 261.

[3] *See, e.g.*, Memorial of the United States, *Case Concerning United States Diplomatic and Consular Staff in Tehran*, I.C.J. Pleadings 1980, p.

less important, is the leading role the United States played in securing these essential protections. Both the Convention and the Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol)[4] are substantially the product of U.S. leadership.

The Convention codified the pre-existing law on consular relations between States, an area that had previously been regulated "mainly by bilateral agreements or other less formal arrangements and by national laws."[5] In that respect, the Convention brought unity to this multiplicity by forging a single, global agreement on consular relations, thereby "contribut[ing] to the promotion of friendly relations between nations."[6] The United States actively participated in creating this agreement, and took a substantial part in

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174 ("A principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations."); U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, January 1, 2001, *available at* http://www.state.gov/s/l/16139.htm ("Consular notification of and access to a detained or arrested U.S. citizen has long been crucial to providing basic protective services abroad.... Protesting unreasonable delays in consular notification is not discretionary but has long been an integral element of U.S. policy to provide protective consular services to detained Americans overseas.")

[4] April 24, 1963, 21 U.S.T. 325, 596 UNTS 487.

[5] Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, reprinted in S. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at 41 (hereinafter "Report").

[6] *Id.*

drafting Article 36, the text of which was agreed to "after much debate."[7]

Significantly, the provision of consular assistance under Article 36 depends at the outset on the detained individual's notice right. As the Report of the U.S. Delegation to the United Nations Conference on Consular Relations notes, Article 36(1)(b) requires that "[arresting] authorities shall inform the person concerned without delay of his rights under this sub-paragraph."[8] The Conference described this requirement as "not beyond means of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad."[9]

While the Convention represents an important codification of the obligation to provide consular notification, the United States has recognized that consular notification, beginning with notice to the detained individual, is not dependent upon the legal protections of the Convention alone:

> Consular notification is in our view a universally accepted, basic obligation that should be extended even to foreign nationals who do not benefit from the VCCR or from any other applicable bilateral agreement. Thus, *in all cases, the minimum requirements are to*

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[7] *Id.* at 59.

[8] Convention, art. 36(1)(a).

[9] Report at 60. Elsewhere, the Report notes that "[t]he standard of treatment required by the present Convention conforms in all essential respects to the views of the United States as to what is or should be required by international law and practice." *Id.* at 74.

notify a foreign national who is arrested or detained that the national's consular officials may be notified upon request; to so notify consular officials if requested; and to permit consular officials to provide consular assistance if they wish to do so.[10]

In addition to providing leadership in codifying consular rights and obligations in the Convention, the United States played an integral role in drafting the Optional Protocol, which provides in relevant part that any "[d]isputes arising out of the interpretation or application of the Convention *shall* lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the Present Protocol."[11] Indeed, this language derives substantially from the original proposal of the United States, which provided that "[a]ny dispute arising from the interpretation or application of this Convention shall be submitted at the request of either of the parties to the International Court of Justice unless an alternative method of settlement is agreed upon."[12] At the Conference, the United States voted *against* a motion by the Yugoslav delegation that would have weakened the

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[10] Bureau of Consular Affairs, U.S. Department of State, Consular Notification and Access, Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them 44 (no date of publication available; "[t]he Department of State expects to update [the publication] every 2-5 years"), *available at* http://travel.state.gov/law/consular/consular_744.html (emphasis added).

[11] Protocol, art. 1 (emphasis added).

[12] Report at 72.

compulsory jurisdiction of the ICJ.[13] While the final language of the Protocol is slightly different than the language proposed by the United States, it clearly provides for the compulsory jurisdiction of the ICJ, precisely as urged by the United States.

That the United States would have argued so assiduously for an Optional Protocol that provided for the compulsory jurisdiction of the ICJ should come as no surprise: the United States has been involved in more cases at the ICJ than any other nation in the world, and has invoked the jurisdiction of the World Court more often than any other State.[14] Two such actions, however, are of particular interest to *amici*.

On November 19, 1951, a C-47 cargo aircraft of the 85th Air Depot Wing of the U.S. Air Force carrying four American airmen was making a routine flight from Erding Air Force Base in Germany to Belgrade, Yugoslavia. During the flight, the plane accidentally crossed into Hungarian airspace and was "brought down by Soviet authorities in Hungary and subsequently turned over with its crew to Hungarian authorities."[15] American authorities searched in

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[13] The Yugoslav delegation proposed adding a paragraph to the U.S. proposal, providing that "[a]ny contracting party may, at the time of signing or ratifying this Convention or of acceding thereto, declare that it does not consider itself bound by paragraph 1, of this article [the United States proposal]. The other contracting parties shall not be bound by the said paragraph with respect to any contracting party which has formulated such a reservation." *Id.* at 73.

[14] The official website for the ICJ lists all cases from 1946 to the present. *See* http://www.icj-cij.org/icjwww/idecisions.htm (last visited Dec. 21, 2005).

[15] Press Release, United States Department of State, U.S. Asks Return of Property Seized in 1951 Plane Incident (Dec. 10, 1952), *in* 27 Department of State Bulletin 980, 980-84 (1952).

vain for the missing fliers until December 2, 1951, when Russia's *Tass* news agency revealed that the aircraft and its crew had been in Hungarian and Soviet custody since its disappearance.[16] Although U.S. State Department officials immediately sought the release of the fliers, Hungarian officials would not permit it, nor, despite repeated requests, would they let American officials speak with the men.[17]

On December 23, 1951, Hungary announced that the four men had been tried by a Hungarian military court and sentenced to a fine of almost $30,000 each, or three months imprisonment, for "intentionally violating the Hungarian border."[18] "The trial was secret, and the United States was

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[16] *Budapest v. U.S.*, N.Y. Times, Dec. 9, 1951, at 168 *available at* http://www.il.proquest.com/proquest/ (ProQuest Historical Newspapers, N.Y. Times (1851-2000)); *see also, U.S. Promises Action to Free Seized Fliers*, Washington Post, Dec. 4, 1951, at 1, *available at* http://www.il.proquest.com/proquest/(ProQuest Historical Newspapers, Washington Post (1877-1988)):

> Also expected is a protest over the fact that the Communist authorities kept silent for nearly two weeks while search planes combed Yugoslavia... Press Officer Lincoln White said at the State Department that the Soviet charges are 'apparently a cover-up for the fact that despite repeated representations by the American Chargé d'Affaires at Budapest, George Abbott, requesting information concerning the plane, the Hungarian authorities repeatedly said they had no information.

[17] Press Release, U.S. Department of State, U.S. Seeks Release of American Fliers Held in Hungary (Dec. 28, 1951), *in* 26 Department of State Bulletin 7 (1952).

[18] *U.S. Air Crew Fined, Hungarian Border "Violation," 30,000 Dollars Each*, London Times, Dec. 24, 1951, at 4, *available at* http://www.galegroup.com/Times/ (Times of London Digital Archive, 1785-1985).

given no opportunity to be present through any representative...."[19] In a speech given to the United Nations the following year, Senator and U.S. Representative to the General Assembly Theodore Green observed:

> What concerns us most here is the stubborn and implacable manner in which both Soviet and Hungarian officials refused U.S. representatives' repeated requests for access to the airmen. Not only this, but both our diplomats and the airmen were prevented from obtaining their own legal counsel in the trial which took place.[20]

Hungary released the American airmen on December 28, 1951. Upon their release, the United States promptly closed the Hungarian consulates in New York and Cleveland and barred Americans from traveling to Hungary.[21] Secretary of State Dean Acheson placed the blame for this retaliation squarely upon Hungary's failure to "live up to the accepted standards of international practice with regard to

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[19] Press Release, U.S. Department of State, U.S. Asks Return of Property Seized in 1951 Plane Incident (Dec. 10, 1952), *in* 27 Department of State Bulletin 980, 980-84 (1952).

[20] Statement by Senator Theodore F. Green, U.S. Representative to the General Assembly, United States Department of State, Soviet Harassment of Foreign Diplomats (Oct. 29, 1952), *in* 27 Department of State Bulletin 787 (1952).

[21] Press Release, U.S. Department of State, U.S. Orders Closing of Hungarian Consulates (Dec. 29, 1951), *in* 26 Department of State Bulletin 7 (1952).

the right of consular officers to exercise protective functions in behalf of nationals of their country."[22]

The incident also provided the occasion for this country's first litigation in the World Court. On March 17, 1954, the United States initiated proceedings at the ICJ against Hungary and the Soviet Union, claiming the failure to allow consular access and assistance had deprived the United States and its citizens of their respective rights to provide and receive consular assistance. "International law," the United States correctly observed, "recognizes the right of the government in such matters to act on behalf of its nationals and is applied in Hungarian judicial practice."[23]

Significantly, the cases against Hungary and the Soviet Union could not proceed because those countries refused to accept the World Court's jurisdiction. Upon the removal of the case from the ICJ's docket, the United States lamented:

> This conduct on the part of the two defendant Governments merely demonstrates again that they have no compunctions in publicly asserting principles of international law and order but in then refusing to permit those principles to be applied to their own conduct. *The U.S. Government must of course accept*

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[22] Press Release, U.S. Department of State, Statement by Secretary Acheson (Dec. 28, 1951), *in* 26 Department of State Bulletin 7 (1952).

[23] Application Instituting Proceedings and Pleadings (U.S. v. Hungary; U.S. v. U.S.S.R.), 1953 I.C.J. Pleadings, (*Treatment in Hungary of Aircraft and Crew of United States of America*) Annex I at 36 (Feb. 16, 1954).

the decision of the International Court of Justice.[24]

The United States again turned to the ICJ in 1979 when it submitted an application instituting proceedings against the Islamic Republic of Iran "concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals."[25] In its application, the United States accused Iran of several treaty violations, including violations of Article 36 of the Convention, and requested that the ICJ "adjudge and declare" that Iran was under a "particular obligation immediately to secure the release of all United States nationals currently being detained."[26] The ICJ indicated provisional measures to be taken by Iran on December 15, 1979, and entered a final judgment in favor of the United States on May 24, 1980. Thereafter, the United States insisted the decisions of the ICJ were binding in all respects, and that Iran must comply with the Court's judgment.[27]

The significance that the United States has attached to the jurisdiction and authority of the ICJ is particularly

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[24] Press Release, U.S. Department of State, U.S. Applications in C-47 Case Removed From Calendar of ICJ (July 16, 1954), *in* 31 Department of State Bulletin 130 (1954) (emphasis added).

[25] *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran)*, 1980 I.C.J. 3 (Judgment of 24 May).

[26] *Id.* at 6.

[27] *U.S. Urges the Iranians to Obey Court Decision*, N.Y. Times, May 25, 1980, pg. 9: "The State Department said today that the decision by the International Court of Justice ordering Iran to release the American hostages and pay compensation to the United States was binding on Iran, and it called on the Teheran Government to carry out its provisions."

relevant here, as that Court, in its *Avena* Judgment, declared that Article 36 confers upon foreign detainees an individual legal right to be notified of the right to inform their consulates of their arrest and to have any communication to their consuls forwarded without delay.[28] The ICJ further declared that U.S. violations of Article 36 should be given effect in judicial proceedings.[29]

In sum, the United States' prominent role in drafting the Convention, including Article 36, its leadership in

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[28] *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), ¶¶ 40 (citing *LaGrand* (Ger. v. U.S.), 2001 I.C.J. 494), 61 & 106(1).

[29] *Id.*, ¶¶ 113-14, 121, 140-41. *See also id.* ¶ 151 ("To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention .... In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.").

The United States' withdrawal from the compulsory jurisdiction of the ICJ in no way lessens the weight of this ruling. The United States has not suggested that the ICJ was not properly exercising its jurisdiction in issuing the *Avena* Judgment and, indeed, has affirmatively indicated that it intends to comply with that judgment. *See* Press Statement by Adam Ereli, Deputy Spokesman, U.S. Department of State (Mar. 10, 2005) ("we remain a party to the Vienna Convention, we remain committed to fulfilling its provisions and we stand by it.... in recognition of the optional protocol and our international commitments, the President has determined that the United States will comply with the judgment of the International Court of Justice."); *see also Jogi v. Voges*, 425 F.3d 367, 383-84 (7th Cir. Sept. 27, 2005) (withdrawal from the Optional Protocol is a prospective action only, with "no effect on disputes that were tendered to and finally decided by the ICJ before the withdrawal.").

establishing the compulsory jurisdiction of the ICJ, and its frequent resort to the ICJ's jurisdiction all counsel a result here that is consistent with the ICJ's judgment. The individual notice right and other rights set out in Article 36 should be enforceable in the courts of this country.

II.

Failure To Provide Vigorous And Robust Enforcement Of The Vienna Convention Could Have Grave Consequences For U.S. Citizens Abroad

The integrity of the international legal system, which has no independent enforcement mechanism, depends on the acceptance of mutual obligation. Behind this acceptance is the essential lesson of diplomatic experience: so long as they are able, nations will respond in kind to the treatment they receive. Reciprocity is thus an inescapable necessity and the bedrock that underlies the foundational principle of international law – *pacta sunt servanda* ("pacts must be respected") – that nations must honor their agreements in good faith.[30] In matters both mundane and monumental, membership in the international community implies a solemn obligation to comply with treaties in good faith, "undertaking to do (or not to do) unto others what they would have done (or not done) unto them."[31]

In the present context, the importance of reciprocity cannot be overstated. Over the last 30 years, the number of Americans living overseas has increased dramatically. The

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[30] *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States § 321 cmt. a (1987) (*pacta sunt servanda* "lies at the core of the law of international agreements and is perhaps the most important principle of international law.")

[31] Louis Henkin, *How Nations Behave* 30 (2d ed. 1979).

State Department now estimates that "[a]pproximately 3.2 million Americans reside abroad, and Americans make about 60 million trips outside the United States each year."[32] The State Department also reports that over 2,500 Americans are arrested abroad annually.[33] And this total does not include the number of citizens detained outside the formal criminal justice process. All told, roughly 6,000 Americans are arrested or detained abroad every year.[34] The largest number of these – 400 – are detained in Mexico, home country of petitioner Sanchez-Llamas.[35]

These statistics demonstrate that many U.S. citizens, at one time or another, will find themselves overseas in need of legal help, and they teach that a failure to provide foreign nationals in the United States with vigorous and robust enforcement of the Vienna Convention could have grave consequences for U.S. citizens abroad. As U.S. jurist Stephen M. Schwebel, President of the International Court of

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[32] Bureau of Resource Management, U.S. Department of State, *FY 2003 Performance and Accountability Report* (2003), *available at* http://www.state.gov/m/rm/rls/perfrpt/2003/html/29037.htm

[33] Office of Overseas Citizens Services, Bureau of Consular Affairs, U.S. Department of State, Department of State Publication 10252, *Overseas Citizens Services*, (2002), *available at* www.international benefits.com/travel-tips/overseas-citizens-services.htm.

[34] Kevin Herbert, *The Terrorist Threat to the American Presence Abroad: A Report of a Consultation of The Critical Incident Analysis Group and The Institute for Global Policy Research, Part II. 2. Threat to Citizens Overseas*, University of Virginia, April 12-13, 1999, *available at* www.healthsystem.virginia.edu/internet/ciag/reports/report_terr_citizens.cfm. (Kevin Herbert is from the Office of Overseas Citizens Services, U.S. Department of State).

[35] Press Statement by James P. Rubin, Spokesman, U.S. Department of State (Apr. 15, 1998), *available at* www.hri.org/news/usa/std/1998/98-04-15.std.html.

Justice, stated of the requirements of Article 36, "the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States."[36]

This risk to U.S. citizens is a matter of persistent concern. The State Department Foreign Affairs Manual instructs American consuls abroad to secure "immediate [consular] notification, no matter what the language of applicable treaties legally requires."[37] Apart from ensuring the timely provision of legal information, prompt notification and access "is necessary to forestall physical abuse of the prisoner ... or to ascertain when such abuse has occurred."[38] American consuls are required to determine if there has been "any physical abuse or violation of rights"[39] and to look for signs of ill-treatment, bearing in mind that "many forms of physical abuse, including systematic torture, are calculated to leave no physical evidence."[40] Consular officers also arrange for detainees to be "examined by a private medical doctor to determine the extent and probable cause of any injury"[41] when appropriate and observe "the physical

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[36] *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, I.C.J. Reports 1998, Order of 9 April, Declaration of President Schwebel.

[37] U.S. Department of State Foreign Affairs Manual (1984), 7 FAM 411.3, *Relations with Local Authorities*.

[38] *Id.*, 7 FAM 412, *Access*.

[39] *Id.*, 7 FAM 414.1, *Abuse of Prisoners*.

[40] *Id.*, 7 FAM 414.1-1, *Examination by an Officer*.

[41] *Id.*, 7 FAM 414.1-2, *Examination by Independent Physician in Cases of Abuse*.

conditions under which the prisoner is being held."[42] Finally, the consulate is required by law "to assist U.S. citizens abroad who, as a result of their incarceration, cannot secure the minimal medical treatment or dietary regimen necessary to sustain an acceptable standard of life."[43]

The State Department has repeatedly stressed to domestic officials the vital importance of reciprocal enforcement of the Convention. As Governor of Texas, George W. Bush received a letter from Secretary of State Madeleine Albright that noted:

> As Secretary of State, ensuring the protection of American citizens abroad – including over 300 imprisoned Texans last year – is one of my most important responsibilities. Our ability to provide such assistance is heavily dependent, however, on the extent to which foreign governments honor their consular notification obligations to us. At the same time, we must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad.[44]

On another occasion, Secretary Albright noted that the State Department stood ready to provide a range of assistance to Americans detained abroad, including

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[42] *Id.*, 7 FAM 414.2, *Conditions of Detention.*

[43] *Id.*, 7 FAM 451, *General Policy (Emergency Medical and Dietary Assistance).*

[44] S. Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LJIL 367, 376 (2002) (quoting from Secretary Albright's letter to Governor Bush, dated November 27, 1998).

"attempting to ensure that they understand the foreign country's legal system and their legal options, by helping them obtain qualified legal representation, by communicating with their families if they wish, and by taking other steps to improve the prisoner's situation and in some cases, to influence the outcome of the proceedings."[45] She has also cautioned that non-compliance with the orders of the International Court of Justice "could be seen as a denial by the United States of the significance of international law and the court's processes in its international relations and thereby limit our ability to insure that Americans are protected when living or traveling abroad."[46]

U.S. consular officers overseas have been instructed to insist on scrupulous observance of Article 36 rights, in order to carry out their "primary mission" of protecting Americans:

> If we are to be effective in protecting the rights of U.S. citizens detained or otherwise in distress abroad, we must first know their situation and we must be vigilant in personally assisting them. By consistently protesting violations of notification and access obligations, we reinforce with the host government the seriousness with which we take our consular responsibilities and

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[45] Letter from Madeleine Albright, Secretary of State, to Victor Rodriguez, Chairman of the Texas Board of Pardons and Parols, quoted in footnote 211 of the Memorial of Mexico, *Case Concerning Avena and Other Mexican Nationals*, I.C.J. Pleadings (2003), *available at* www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

[46] Linda Greenhouse, *Court Weighs Execution of Foreigner*, N.Y. Times, April 14, 1998, page 14 (quoting from Secretary Albright's letter to Virginia Governor James Gilmore).

> underscore our efforts to protect our citizens against any abuse, mistreatment or discrimination.[47]

Secretary Albright's position is neither surprising nor unusual. Other State Department officials have voiced the same sentiment.[48] Most recently, William H. Taft, IV, the Department's former Chief Legal Advisor, observed in a letter to the Oklahoma clemency officials presiding over the recent case of Osbaldo Torres, Article 36 of the Convention "is not only of importance to foreign nationals in the United States. It serves to protect all Americans who travel or live

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[47] U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, *supra*, fn. 3.

[48] For example, State Department Spokesman James P. Rubin stated that "[c]onsular notification is no less important to [other countries] than to U.S. nationals outside the United States. We fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment we expect for our citizens overseas. We cannot have a double standard." Press Statement by James P. Rubin, Spokesman, U.S. Department of State (Nov. 4, 1998), *available at* http://secretary.state.gov/www/briefings/statements/1998/ps981104.html. State Department Spokesman R. Nicholas Burns captured perfectly the obligation imposed by reciprocity:

> A lot of American citizens who are tourists ... find themselves in trouble, find themselves ill or in prison because they didn't understand the legal system or they came crosswise with the system, and the only people they can turn to for help are American diplomats. So it's critically important to the average American – and millions of Americans travel overseas every year – that they have Americans who can help them when they get into trouble. It happens all the time.

Press Statement by R. Nicholas Burns, Spokesman, U.S. Department of State (Sept. 29, 1995), *available at* http://www.hri.org/docs/statedep/1995/95-09-29.std.html.

abroad."[49] The Executive has further emphasized the importance of reciprocal compliance in its determination that the *Avena* Judgment be given full effect in the state courts. "Consular assistance is a vital safeguard for Americans abroad, and the government has determined that, unless the United States fulfills its international legal obligations to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected."[50]

Robust enforcement of the Vienna Convention is not merely the concern of Executive officials. On the contrary, the law of unintended consequences in this field has been the subject of frequent judicial comment. In *Standt v. City of New York*, for example, the Court observed:

> The United States has repeatedly invoked Article 36 on behalf of American citizens detained abroad who have not been granted the right of consular access.... It is critical for the judiciary to recognize VCCR rights of foreign nationals detained in the United States for the United States to continue its success in invoking the Vienna Convention on behalf of U.S. citizens detained abroad.[51]

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[49] S. Lynne Walker, *Okla. case pits U.S. against world court*, San Diego Union-Tribune, May 7, 2004 (quoting Mr. Taft's letter to the Oklahoma Pardon and Parole Board), *available at* http://www.signonsandiego .com/uniontrib/20040507/news_ n7penalty.html .

[50] Brief of the United States as *Amicus Curiae* at 51, *Medellín v. Dretke*, 125 S.Ct.2d 2088 (2005).

[51] 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001).

Judge Butzner, of the Fourth Circuit Court of Appeals, expressed a similar sentiment during the *Breard* litigation:

> United States citizens are scattered about the world – as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that international law is founded upon mutuality and reciprocity.[52]

In another case, one jurist asked, perhaps only rhetorically:

> Why should Mexico, or any other signatory country, honor the Treaty if the U.S. will not enforce it? The next time we see a *60 Minutes* piece on a U.S. citizen locked up in a Mexican jail without notice to any U.S. government official we ought to remember these cases.[53]

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[52] *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner J., concurring) (internal quotations omitted); *see also U.S. v. Carillo*, 70 F. Supp. 2d 854, 860 (N.D. Ill. 1999) (Treaty violations not only undermine the 'Law of the Land;' but also international law, where reciprocity is key. If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens.").

[53] *Flores v. State*, 994 P.2d 782, 788 (Okla. Crim. App. 1999) (Chapel, J., concurring in result); *see also id.* (court's narrow vision of the Convention "puts U.S. citizens traveling abroad at risk of being detained without notice to U.S. consular officials.").

Organizations with members most affected by a restrictive interpretation of the Convention have also voiced their concerns. The Southern Baptist International Mission Board, for example, oversees 4,200 missionaries and 15,000 volunteers in 130 countries. The president of the organization noted his concerns in urging former Virginia Governor George Allen to commute the sentence of an inmate on Virginia's death row. "I am horrified to think of the potential repercussions in Mexico and other countries, and its potential harm to our missionaries' that could occur because the Commonwealth of Virginia failed to honor the obligations of the Vienna Convention."[54]

The danger to U.S. citizens, though perhaps more pronounced in these turbulent times, does not arise solely from the random acts of rogue states, as a recent incident in China makes plain. Gao Zhan, a sociologist and permanent resident based at American University, was traveling with her young son in China when she was arrested for espionage.[55] She and her son, an American citizen, were held *incommunicado* by China's state security ministry, without notice to the U.S. Embassy. When her husband came to China seeking information, he too was detained and threatened.[56] This incident prompted the House of

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[54] Frank Green, *Mission Chief Urges Allen to Commute Sentence*, Richmond Times-Dispatch, Sept. 17, 1997, at A1.

[55] *See US Family Detained in China*, BBC News, Mar. 21, 2001, *available at* http://news.bbc.co.uk/1/hi/world/asia-pacific/1233163.stm; Ann Scott Tyson, *Where's Gao? Disappeared in China: 100 days and counting*, Christian Science Monitor, June 5, 2001, *available at* http://www.csmonitorservices.com/csmonitor/archivesearch. jhtml.

[56] *See id.*

Representatives to pass House Resolution 160, unanimously condemning the acts of the Chinese government.[57]

In sum, *amici* stake their argument on the mutually binding obligations of international treaties. Responsible officials in this country have repeatedly expressed the concern that a failure to honor Article 36 presents grave risks to American citizens living and traveling abroad. The Founders expressed a similar concern when they foresaw what has eluded the lower courts in these cases: membership in the international community implies reciprocal obligations and benefits.[58] The obligations at issue here begin with a judicially enforceable individual right of notice, as set out in Article 36. While the reciprocal obligations of Article 36, if honored, impl[illegible] burdens that this country must bear, they also, by a like reciprocity, stand to benefit its citizens most. We urge the Court to recognize those obligations today.

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[57] H.R. Res. 160, 107th Cong. (2001).

[58] *The Federalist No. 64*, at 392 (Clinton Rossiter ed., 2003):

> Others, though content that treaties should be made in the mode proposed, are averse to their being the SUPREME laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

MOISES SANCHEZ-LLAMAS, PETITIONER,

v.

STATE OF OREGON

MARIO A. BUSTILLO, PETITIONER,

v.

GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS

On Writs of Certiorari to the Supreme Courts of Oregon and Virginia

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The Association of the Bar of the City of New York ("ABCNY") is a professional association of over 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law. ABCNY educates the bar and the public about various legal issues, including international law and criminal procedure. ABCNY is concerned that the United States has not been honoring its obligations under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77 ("Vienna Convention" or "Convention"), to inform foreign nationals arrested in the United States of their rights to consular notification and access. This failure prevents foreign nationals from enjoying the full protections that our legal system provides to guarantee fair criminal trials. It also discourages other nations from respecting the consular notification rights of U.S. nationals arrested abroad – rights that may be critical to their fair treatment by foreign criminal justice systems. ABCNY believes that this Court must hold that the Vienna Convention confers enforceable rights – both because the Convention's text confers those rights in unmistakable terms, and in order to ensure that foreign nationals in the United States and U.S. nationals abroad receive the consular notification and access guaranteed by the Convention and critical to fair criminal procedures.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases are about ensuring a fair criminal process both for foreign nationals arrested in the United States and for U.S. nationals arrested abroad. Almost 40 years ago, the United States ratified the Vienna Convention, a multilateral treaty to which 168 nations are now parties. The Convention recognizes

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[1] Letters from petitioners and respondents indicating consent to file this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

that individuals arrested in foreign countries face alien and unfamiliar criminal justice systems. Those individuals will therefore frequently lack both the understanding and the resources needed to avail themselves of the protections foreign systems provide to ensure the fairness of their criminal procedures. The Convention addresses that problem by guaranteeing that individuals arrested in foreign countries have access to consular officials from their home countries. Those consular officials provide a cultural bridge between the foreign nationals and the criminal justice systems of the arresting countries – educating the nationals about the legal systems, making sure they have adequate representation, helping them to communicate in the language of the arresting countries, and assisting them to obtain evidence or witnesses located in their home countries. Consular assistance thus places foreign nationals – whether foreigners in the United States or U.S. nationals in a foreign country – on equal footing with other criminal defendants. It enables *all* defendants, regardless of nationality, to obtain the fairest possible resolution of the charges against them.

To ensure that consular assistance is available, Article 36 of the Convention provides that foreign nationals "shall have" the "freedom" to "communicat[e] with" and have "access to their consular officers." Vienna Convention, art. 36(1)(a). Article 36 further provides that, if a foreign national is arrested, the competent authorities of the arresting nation "shall, without delay, inform" the appropriate consular officials of the arrest if the national "so requests." *Id.*, art. 36(1)(b). Article 36 also requires that "[a]ny communication addressed to the consular post by the person arrested . . . shall also be forwarded . . . without delay." *Id.* And it mandates that the arresting authorities "shall inform" the foreign national "without delay of his rights" under the Convention. *Id.*

These provisions give foreign nationals individual rights enforceable in the courts of the United States (or other arresting nations). This Court has long recognized that treaties can give rise to individual rights, and, under the Court's treaty in-

terpretation jurisprudence, Article 36 is not a close case. Its text clearly establishes individual rights: it uses mandatory language, links state consular notification obligations to the will of individual foreign detainees, and expressly describes its provisions as "rights" and "freedom[s]" belonging to foreign nationals. Given the clarity of the text, the Court need not look any further. In any event, other interpretive guides reinforce the conclusion that Article 36 creates individual rights: The Convention's negotiation history reveals that the delegates, in agreeing upon the final version of Article 36, were fully aware that it confers individual rights. The Executive Branch's contemporaneous understanding of the Convention was in accord. And the bulk of the international community agrees.

The conclusion that Article 36 confers individual rights is not simply compelled by its text. That conclusion is also essential as a practical matter. Consular officials play a crucial role in ensuring that foreign nationals understand and are able to invoke the rights guaranteed to criminal defendants in the United States. The importance of consular assistance to foreign defendants is not mere speculation: Examples from case law vividly illustrate that consular involvement – or its absence – has a decisive impact on whether foreign nationals are able to invoke the procedural protections to which all defendants are entitled and which are essential to a fair trial.

Despite its fundamental importance, consular notification rarely occurs in the United States. For example, recent studies indicate that less than *five percent* of foreign defendants on death row received timely notification of their consular rights. Courts have long recognized that judicial enforcement is a powerful tool for giving legal rights practical force. Recognizing that the Convention creates enforceable rights thus will not only give effect to the treaty's clear language but will also improve this country's disappointing record of compliance.

The benefits of such an improvement would extend far beyond foreign defendants in the United States. Every year, thousands of Americans are arrested abroad. U.S. consular of-

ficials provide those Americans with a broad range of assistance – explaining foreign legal and judicial procedures, monitoring conditions of confinement, and, if necessary, intervening to forestall physical abuse and obtain medical attention. Consular assistance can make the difference between fair treatment and capricious punishment (or worse) for Americans arrested abroad. But, as the State Department itself has recognized, foreign nations are unlikely to comply with their consular notification obligations to U.S. nationals if the United States does not comply with its obligations to foreign nationals. Mutuality and reciprocity are foundational principles of international law. Although U.S. compliance with its consular notification obligations cannot *guarantee* that Americans will be able to secure consular assistance abroad, U.S. compliance with the Convention will strongly encourage other nations to comply as well. Protecting American interests abroad thus supplies an additional strong reason for this Court to endorse the individual rights that are plainly contained in the Convention's text.

ARGUMENT

THE VIENNA CONVENTION CREATES JUDICIALLY ENFORCEABLE RIGHTS

The initial question in these cases – indeed, in any case in which a criminal defendant raises a claim or defense under the Vienna Convention – is whether the Convention creates judicially enforceable rights. The importance of that question transcends situations where a defendant seeks a suppression remedy or habeas relief. Indeed, this Court's answer to the question will determine whether a defendant can ever obtain relief for a violation of the Convention.[2]

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[2] This brief addresses only that initial question. *Amicus curiae* anticipates that the parties and other *amici* will fully address the other questions presented, including whether suppression is an available remedy for violations of the Convention and whether consideration of claims under the Convention can be precluded by procedural bar rules where the arresting state failed to comply with the Convention's notification requirements.

As four members of this Court have recognized, if the Convention does not create enforceable individual rights, a foreign detainee can "*never* complain in court – even in the course of a trial or on direct review – about a state's failure to" inform the detainee of his consular notification rights. *Medellin v. Dretke*, 125 S. Ct. 2088, 2102-03 (2005) (O'Connor, J., joined by Stevens, Souter, and Breyer, JJ., dissenting from dismissal of writ of certiorari as improvidently granted).[3] This Court should not – and need not – countenance that unjust result. As explained below, the text of the Convention vests foreign detainees with individual rights to consular notification and access. And recognizing those rights is essential to ensure that both foreigners arrested in the United States and Americans detained abroad receive fair criminal process.

A. Article 36 Of The Convention Creates Enforceable Individual Rights to Consular Notification And Access

Whether the Vienna Convention creates enforceable rights turns on two questions: First, is the Convention "self-executing," *i.e.*, enforceable by the courts without the need for implementing legislation? And, second, does it create individual rights? There is no serious dispute about the answer to the first question: The Convention is self-executing.[4] It therefore

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[3] The remainder of the Court did not address whether the Convention creates individual rights but instead dismissed the writ as improvidently granted in light of a successive state habeas petition, filed days before oral argument, which presented the petitioner's claims in a less complicated procedural posture. *See Medellin*, 125 S. Ct. at 2089-92 (per curiam).

[4] The State Department adopted that position when Congress was considering ratification of the Convention. S. Exec. Doc. No. 91-9, app. at 5 (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration). The United States has adhered to that position in its filings in this Court. Brief for the United States as *Amicus Curiae* at 26, *Medellin*, 125 S. Ct. 2088 (2005). The four members of the Court who addressed the question whether the Convention is self-executing reached the same conclusion in *Medellin*. 125 S. Ct. at 2103 (O'Connor, J., joined by Stevens, Souter, and Breyer, JJ., dissenting from dismissal of writ of certiorari as improvidently

has the "force and effect" of law, *Whitney v. Robertson*, 124 U.S. 190, 194 (1888), and "a court must enforce it on behalf of an individual" to whom it accords rights, *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992); *see Foster v. Neilson*, 27 U.S. (2 Peters) 253, 314 (1829); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). Consequently, the critical question for this Court is whether the Convention creates individual rights. The answer is clearly yes.

1. Treaties can create enforceable individual rights

This Court long ago recognized that treaties can create individual rights. Although a treaty is primarily an agreement among nations, it "may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country." *The Head Money Cases*, 112 U.S. 580, 598 (1884).

Consistent with that principle, this Court has, over the course of two centuries, repeatedly permitted individual foreign nationals to assert rights arising from treaties. *See, e.g.*, *Ware v. Hylton*, 3 U.S. (3 Dallas) 199, 239 (1796) (enforcing a British citizen's right to collect a debt under a peace treaty providing that "creditors, on either side, shall meet with no lawful impediment to the recovery of the full value . . . of all bona fide debts"); *Heong v. United States*, 112 U.S. 536, 542 (1884) (recognizing an individual right to reenter the United States under a treaty providing that "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord"); *United States v. Rauscher*, 119 U.S. 407, 410, 418-19, 430 (1886) (concluding that an extradition treaty between the United States and Great Britain created an individual right to be tried only for the offense

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granted). And that view is generally shared by the lower courts. *See Jogi v. Voges*, 425 F.3d 367, 377-78 (7th Cir. 2005) (citing cases).

forming the basis of the extradition); *Asakura v. City of Seattle*, 265 U.S. 332, 339-40 (1924) (recognizing a Japanese citizen's right to engage in pawn brokering on the same terms as U.S. citizens under a treaty guaranteeing Japanese the "liberty to . . . carry on trade . . . upon the same terms as native citizens or subjects"); *Clark v. Allen*, 331 U.S. 503, 507 (1947) (recognizing the right of a German national to sell inherited property under a treaty providing that "such national shall be allowed a term of three years in which to sell the same").

In line with those holdings, the Ninth Circuit has concluded that the Vienna Convention itself (in provisions not at issue here) confers individual rights on foreign consular officials. *See Risk v. Halvorsen*, 936 F.2d 393, 397 (9th Cir. 1991). The United States agrees. *See* Brief for United States as *Amicus Curiae* at 26 n.7, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005). Thus, there can be no question that treaties, including the Vienna Convention, may create individual rights.

2. *Determining whether Article 36 of the Vienna Convention creates individual rights requires an analysis akin to statutory interpretation*

To decide whether Article 36 of the Convention creates individual rights, this Court engages in an analysis similar to statutory interpretation. For a statute, the goal is to ascertain the intent of Congress; for a treaty, the goal is to ascertain the intent of the parties. *See United States v. Stuart*, 489 U.S. 353, 366 (1989); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). As with statutes, a treaty's text is by far the most important consideration in determining its meaning. *See Alvarez-Machain*, 504 U.S. at 663; *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699-700 (1988); *Maximov v. United States*, 373 U.S. 49, 52-54 (1963).

If the treaty's text is "difficult or ambiguous," courts may look – as when interpreting statutes – to extrinsic materials to assist in ascertaining the parties' intent. *Volkswagenwerk*, 486

U.S. at 700. These materials include the negotiation and ratification history of the treaty (which is analogous to the legislative history of a statute). *Id.* Courts may also look – again as with statutory interpretation – to the views of the Executive Branch. *See Sumitomo*, 457 U.S. at 184-85. But those views are "not conclusive," *id.* at 184, and they are due respect only if they are "reasonable," *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999). Indeed, this Court has not hesitated to reject the Executive's interpretation of a treaty when that view was contrary to the treaty's text or to the Executive's previous interpretation. *E.g.*, *Chan*, 490 U.S. at 134; *id.* at 136 (Brennan, J., concurring in the judgment); *Perkins v. Elg*, 307 U.S. 325, 328, 337-49 (1939); *Johnson v. Browne*, 205 U.S. 309, 318-21 (1907).

Courts may also consult extrinsic materials, unique to treaties, that reflect their international nature. Those materials include the views of the international community, as reflected by the construction adopted by other treaty parties and the interpretation given by international bodies. *See Stuart*, 489 U.S. at 369; *Breard v. Greene*, 523 U.S. 371, 374 (1998).

A final interpretive guide unique to treaties is the principle of liberal construction. Under that principle, "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940). The principle of liberal construction reflects the nature of the international context in which treaties are concluded. *See Factor v. Laubenheimer*, 290 U.S. 276, 293 (1933). And this Court has adhered to that principle consistently over two centuries. *See Stuart*, 489 U.S. at 368; *Kolovrat v. Oregon*, 366 U.S. 187, 193 (1961); *Jordan v. Tashiro*, 278 U.S. 123, 127, 129 (1928); *Hauenstein v. Lynham*, 100 U.S. (10 Otto) 483, 487 (1880); *Shanks v. Dupont*, 28 U.S. (3 Peters) 242, 249 (1830).

None of the extra-textual sources that courts may use to clarify an ambiguous treaty is determinative; each is simply one factor among many that bear consideration. *See Air France v. Saks*, 470 U.S. 392, 400-05 (1985); *Stuart*, 489 U.S. at 366-70. Even more important, as with statutory interpretation, extra-textual considerations cannot trump the plain meaning of a treaty's text. Thus, "where the text is clear," the Court "ha[s] no power" to adopt a contrary interpretation. *Chan*, 490 U.S. at 134. *See also Maximov*, 373 U.S. at 52-54 (rejecting interpretation based on treaty's "objective" because the proffered interpretation was inconsistent with the treaty's "plain language"); *Ware*, 3 U.S. at 239 (Chase, J.) ("If the words express the meaning of the parties plainly, distinctly, and perfectly, there ought to be no other means of interpretation.").

3. Article 36 creates individual rights to consular notification and access

Under these established interpretative principles, Article 36 of the Vienna Convention plainly creates individual rights. The text of Article 36 is unambiguous, and resort to other sources of interpretation is therefore unnecessary. Nonetheless, the relevant extra-textual sources confirm the clear import of the treaty language.

Article 36(1)(a) provides that "[n]ationals of [a] sending State shall have the . . . freedom" to communicate with and have access to "consular officers of the sending State." Vienna Convention, art. 36(1)(a).[5] Article 36(1)(b) mandates that, when the national of a sending State is arrested or detained, "if [the national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State." *Id.*, art. 36(1)(b). That subparagraph further commands that "[a]ny communication addressed to the

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[5] As relevant here, the term "sending State" refers to the foreign national's home country. The term "receiving State" refers to the country in which the foreign national is arrested or detained.

consular post by the person arrested, in prison, custody, or detention shall also be forwarded by the said authorities without delay." *Id.* Article 36(1)(b) also instructs that the arresting "authorities shall inform the person concerned without delay of his rights under this sub-paragraph." *Id.* Article 36(2) makes clear that the "rights referred to" in Article 36(1) "shall be exercised in conformity with the laws and regulations of the [arresting] State," but those "laws and regulations must enable full effect to be given to the purposes for which the rights accorded under [the] Article are intended." *Id.*, art. 36(2).

Thus, the text of Article 36 confers individual rights with unmistakable clarity. It speaks in manifestly mandatory terms: Nationals of the sending State "*shall* have the . . . freedom" to communicate with and have access to their consulate. *Id.*, art. 36(1)(a) (emphasis added). The receiving State "*shall*" inform the sending State's consular post of a foreign national's arrest "if [that national] so requests." *Id.*, art. 36(1)(b) (emphasis added). The receiving State "*shall*" transmit any communications the foreign detainee wishes to send to his consulate. *Id.* (emphasis added). And the receiving State "*shall*" inform the detained foreign national of "his rights" under the Convention. *Id.* (emphasis added).

Even more significant, Article 36 does not simply impose obligations on *states* but links those obligations to *individuals*: Article 36(1)(a) specifies that "[n]ationals of a sending State" shall have the specified freedoms. *Id.*, art. 36(1)(a). The first clause of Article 36(1)(b) gives control over consular notification to the *foreign detainee* by providing that the sending State shall be notified *only* if "he so requests." *Id.*, art. 36(1)(b). And the last clause of Article 36(1)(b) specifies that "the person concerned" (*i.e.*, the foreign detainee) possesses the rights to have his consulate notified and his communications delivered. *Id.*

Finally, Article 36 repeatedly describes its provisions as creating "rights" or "freedom[s]." Article 36(1)(a) describes

the foreign national's entitlement to consular communication and access as a "freedom." *Id.*, art. 36(1)(a). Article 36(1)(b) refers to the foreign detainee's power to have his consulate notified and his communications delivered as his "rights." *Id.*, art. 36(1)(b). And Article 36(2) twice refers to the "rights" accorded by the Article. *Id.*, art. 36(2).

This Court has consistently interpreted treaties employing similar language to confer individual rights. For example, the treaties held to create individual rights in *Ware v. Hylton* and *Clark v. Allen* also used mandatory language to accord benefits to individuals. *See Ware*, 3 U.S. at 239 (treaty provided that "*creditors*, on either side, *shall* meet with no lawful impediment") (emphasis added); *Clark*, 331 U.S. at 507 (treaty stated that "*such national shall* be allowed a term of three years in which to sell" inherited property) (emphasis added). And the treaties held to create individual rights in *Heong v. United States* and *Asakura v. City of Seattle* not only used mandatory language to confer benefits on individuals but, like Article 36, also referred to "rights" or "liberties." *See Heong*, 112 U.S. at 571 (treaty provided that "*Chinese laborers . . . shall* be allowed to go and come of their own free will and accord, and shall be accorded all the *rights* . . . accorded the citizens and subjects of the most favored nation") (emphasis added); *Asakura*, 265 U.S. at 340 (treaty stated that "*citizens* or *subjects* of each of the High Contracting Parties *shall* have *liberty* . . . to carry on trade . . . upon the same terms as native citizens and subjects") (emphasis added) (quotation omitted).

Indeed, even if Article 36 were a *statutory* provision, it would clearly create individual rights. In determining whether a statute creates an individual right, the Court considers whether it uses "explicit right- or duty-creating language," *Gonzaga University v. Doe*, 536 U.S. 273, 284 n.3 (2002) (quotation omitted), whether it employs mandatory language, *see id.*, and whether it is "phrased in terms of the persons benefited," *Cannon v. University of Chicago*, 441 U.S. 677,

692 n.13 (1979). As described above, Article 36 meets all three of those criteria. This Court has concluded that statutes create individual rights, even when they do *not* describe the entitlements that they create as "rights," provided that they use mandatory language directed at a benefited class. *See Gonzaga*, 536 U.S. at 284 n.3 (noting that Title VI and Title IX both create individual rights and highlighting their use of the phrase "*[n]o person* in the United States *shall*") (quotation omitted). Here, Article 36 not only uses mandatory language directed toward a specific benefited class but also explicitly employs the term "rights." It is thus virtually certain that, if Article 36 were a statute, this Court would hold that it creates individual rights. *See Medellin*, 125 S. Ct. at 2104 (O'Connor, J., dissenting).

Since Article 36 would create individual rights if it were a statute, there can be no doubt that it does so as a treaty. This Court has long taken a liberal approach to the interpretation of treaties. *See supra* p. 8. As Justice Story put it almost two hundred years ago in *Shanks*: "If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?" 28 U.S. at 249. Under that approach, the Court has enforced individual rights in treaties that would likely not have been held to confer rights under the analysis used for statutes. *See, e.g., Rauscher*, 119 U.S. at 410-11 (enforcing individual right under treaty that did not purport to confer benefit on individuals). Where, as here, a treaty satisfies the standards for creating individual rights by statute, there is even more reason to recognize an individual right under the treaty.

Because the text of Article 36 is clear, there is no reason to consult other sources, such as the prefatory language to the Convention or to Article 36 itself. *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277, 290-91 (2000); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 158 n.13 (1982). In

any event, those sources do not require a different result. Although the Convention's preamble disclaims an intent to "benefit individuals," in context, that disclaimer refers to the lack of intent to benefit individual *consular officials*, not to an intent to restrict the rights of foreign nationals. *See Jogi v. Voges*, 425 F.3d 367, 381 (7th Cir. 2005); Report of the U.S. Delegation to the United Nations Conference on Consular Relations, *reprinted in* Vienna Convention on Consular Relations, S. Exec. Doc. No. 98-118, at 46 (May 8, 1969).

The prefatory language introducing Article 36 is also fully consistent with the conclusion that the Article confers individual rights. That language indicates that the provisions of Article 36 are intended to "facilitat[e] the exercise of consular functions relating to nationals of the sending State." Vienna Convention, art. 36, preface. But that purpose is fully consistent with an individual right to consular notification and access. By placing the decision to notify the consulate in the hands of the detained foreign national, Article 36 simultaneously assists consular officials in performing their functions and protects the individual rights of the detained foreign nationals to choose whether they want assistance. *See* S. Exec. Doc. No. 98-118, at 60.

The drafting debates on the Convention likewise indicate that Article 36 is concerned with individual rights as well as facilitating the consular function. The original draft of Article 36(1)(b) required consular notification of arrest or detention in every case, regardless of the desires of the detainee. *See* S. Exec. Doc. No. 98-118, at 59. When the delegates amended the Article – by tying consular notification to a detainee's request and requiring receiving States to notify detainees of their rights to consular notification and communication – the delegates explicitly recognized that they were changing the Convention "to 'protect the rights of the national concerned.'" Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations*, 18 Mich. J. Int'l L. 565, 597 n.200 (1997)

(quoting United States delegate); *see id.* at 597-98; S. Exec. Doc. No. 98-118, at 59-60. Similarly, when one delegation proposed amending Article 36(1)(a) to eliminate its reference to foreign nationals' freedom to communicate with their consulates, other delegates recognized that this was an attempt to eliminate an individual "right" to consular communication from the Convention. *See* Kadish, 18 Mich. J. Int'l L. at 596-97. The amendment was withdrawn in the face of strong opposition, and Article 36(1)(a) retained language recognizing this freedom of communication. *Id.*

Consistent with this negotiation history, the Letter of Submittal from the Secretary of State to the President and the Report of the United States Delegation both indicated that the Convention recognized individual "right[s]." *See* S. Exec. Doc. No. 98-118, at vi, 60. Those documents make clear that the Executive Branch's contemporaneous interpretation of the Convention was that it created individual rights. That original interpretation of the Convention is still reflected in the numerous references to individual rights contained in the State Department's booklet on Consular Notification and Access, *see* U.S. Department of State, Consular Notification and Access at 3, 14, 15, 18, 19, 20, *available at* http://travel.state.gov/pdf/CNA_book.pdf, and its Foreign Affairs Manual ("FAM"), *see* 7 FAM § 421.1-1 (Sept. 3, 2004), *available at* http://foia.state.gov/regs/fams.asp?level=2&id=8&fam=0.[6] The cur-

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[6] The statement in a 1970 letter that the State Department did "not believe that the Vienna Convention will require significant departures from the existing practice within the several states of the United States," *United States v. Li*, 206 F.3d 56, 64 (1st Cir. 2000), is not to the contrary. That statement does not address whether the Convention creates individual rights. And the statement cannot mean that the Convention would not require the states to do *anything* new. Regardless of whether the Convention creates enforceable rights, it indisputably requires arresting authorities to inform foreign nationals that they are entitled to notify and communicate with their consulates. Consistent with that requirement, the State Department's Consular Notification and Access booklet explicitly instructs state

rent Executive Branch view that the Convention does not create individual rights is due little weight, because it is inconsistent with both the plain text of the Convention and the contemporaneous interpretation of U.S. negotiators and other diplomats. *See supra* p. 8.

Other extra-textual interpretive guides also confirm that Article 36 creates individual rights. Most notably, the International Court of Justice ("ICJ") has so held. *LaGrand Case (Germany v. United States)*, 2001 I.C.J. 466, 492-94 (June 27). In all cases involving the Convention, this Court owes "respectful consideration" to the ICJ's interpretation because the ICJ is "an international court with jurisdiction to interpret" that treaty. *Breard*, 523 U.S. at 375. But the ICJ's interpretation is entitled to even greater weight in these cases. The Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, 21 U.S.T. 326, gives the ICJ "compulsory jurisdiction" over disputes between parties to the Protocol arising out of the interpretation of the Convention. The United States was a party to the Protocol both when the ICJ held, in the *LaGrand Case*, that Article 36 creates individual rights and when the arrests in these cases were made. The ICJ's interpretation is therefore binding on the United States here. *See* 21 U.S.T. 326; *see also, e.g.*, Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, *Bustillo v. Johnson*, No. 05-51. Moreover, there are currently 45 parties to the Protocol, and each of those 45 parties is bound to follow the ICJ's interpretation. Thus, even if the United States were not formally bound by the ICJ's interpretation, that interpretation would still be entitled to significant weight as evidence of how other treaty parties interpret the Convention. *See supra* p. 8.

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and local law enforcement personnel that they must tell foreign detainees of their right to consular access, and it provides suggested statements for complying with that obligation, *id.* at 74-75 (dissenting opinion).

In sum, the plain language of the Convention, and the weight of the extra-textual interpretive sources, both make clear that Article 36 confers individual rights. As the remainder of this brief explains, it is essential that the Court give effect to the command of the Convention's text. Recognizing that the Convention confers enforceable rights is critical to ensuring that the United States adheres to the Convention's requirements. That adherence, in turn, is vital to guaranteeing that foreign nationals arrested in the United States and U.S. nationals arrested abroad are able to avail themselves fully of the panoply of protections that assures a fair criminal process.

B. Enforceable Rights To Consular Notification And Access Are Essential For Foreign Nationals To Receive The Basic Protections That Guarantee A Fair Criminal Process

Although respondents contest that the Convention creates enforceable rights, no one disputes that it obligates the United States to inform foreign detainees that they are entitled to notify their consulates of their arrests and to communicate with consular officials. In practice, however, the United States hardly ever complies with that undisputed obligation. The overwhelming majority of foreign nationals arrested in the United States are not informed of their rights to consular notification and access. As a result, those nationals are often unable to avail themselves of basic protections designed to ensure fair criminal procedures – including the right to counsel, *Miranda* protections, and the right to exculpatory evidence.

It is thus vital that the notification of consular rights required by the Convention actually take place – both to vindicate the Nation's international obligations and to preserve its commitment to due process of law. And a powerful way for this Court to ensure adherence to the Convention's requirements is to honor the Convention's provisions creating an individual, judicially enforceable right to consular notification.

1. Whether foreign nationals are notified of their rights to consular assistance often determines whether they obtain the fundamental rights guaranteed to criminal defendants

Many foreign nationals lack a basic understanding of the American legal system. In addition, their ability to communicate in English is often limited. As a result, foreign detainees will frequently not completely comprehend the charges against them or their fundamental legal rights. Kadish, 18 Mich. J. Int'l L. at 605. Consular officials play a critical role in remedying that problem. "The consulate ensures that a detained national fully understands the nature of the charge against [him], as well as [his] legal rights and options." Anne James, *The International Justice Project, Equal Protection: Consular Assistance and Criminal Justice Procedures in the USA* at 21 (hereinafter "James"). In essence, the consulate serves as a "cultural bridge" between the foreign defendant and the local legal system. *Id.* And that cultural bridge is often crucial to place the arrested foreign national "on par with a non-foreigner." Kadish, 18 Mich. J. Int'l L. at 606.

Consular officials provide an array of assistance to ensure that detained foreign nationals obtain the procedural protections to which criminal defendants are entitled under U.S. law. The following list illustrates the types of assistance provided:

- ***Consular officials ensure that foreign nationals are informed of their rights in a language that they understand.***

Most frequently, that information includes an explanation of the right to an attorney, as well as the right not to speak to the police in the absence of an attorney. It may also include, for example, reassurance that the detainees will not suffer adverse consequences if they choose not to talk, and notice that they can have a court-certified interpreter present at legal proceedings. *See, e.g., Cardenas v. Dretke*, 405 F.3d 244, 251-52 (5th Cir. 2005) (Mexican consulate would have explained to defendant the significance of rights to counsel and to remain silent); *United States v. Ortiz*, 315 F.3d 873, 884 (8th Cir.

2002) (former Consul General for Colombia in Chicago testified that, had he been in contact with defendants, he would have advised them of their right to an attorney); *State v. Buenaventura*, 660 N.W.2d 38, 46 (Iowa 2003) (parties stipulated that, "had the Philippine consulate been notified of [defendant]'s detention, it would have advised him to talk to an attorney before giving a statement"); *State v. Navarro*, 659 N.W.2d 487, 488 (Wis. Ct. App. 2003) (Mexican consular employee stated that, had he been given the opportunity to speak with the defendant, "he would have advised him not to make or sign any statements whatsoever until the assistance of legal counsel had been obtained"); *State v. Martinez-Rodriguez*, 33 P.3d 267, 276 (N.M. 2001) (Mexican consul submitted affidavit stating that he would have "advised [defendants] not to speak with anyone, and that they in fact would not suffer any adverse consequence if they chose not to give statements . . . , that they can also have a court certified interpreter to be present at any stage of the proceedings, and also about the right to request assistance of legal counsel").

The majority of American citizens are very familiar with the right to counsel and the right against self-incrimination, which provide the foundation for a fair criminal trial. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Strickland v. Washington*, 466 U.S. 668, 684 (1984). But those rights may be "meaningless or insignificant to many foreign detainees," who may be unaccustomed to our adversarial system of justice or come from countries where remaining silent under questioning can be used against them in court. James at 21. Therefore, without consular assistance to explain the significance of those rights, foreign nationals may waive them unwittingly. *Id.* at 21-23.

- ***Consular officials provide foreign nationals with information about lawyers who can represent them.***

Consular officials routinely "contact the arrested person and undertake to determine whether the attorney on the case is

adequately qualified or whether a more qualified attorney is required to properly defend the arrested individual." *Cauthern v. State*, 145 S.W.3d 571, 591 (Tenn. Crim. App. 2004) (testimony of German Deputy Consul General); *see, e.g., United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1126 (C.D. Ill. 1999) (Mexican consul stated that, had defendants contacted him, he would have "assist[ed] them in obtaining competent legal representation").

This assistance may involve placing foreign nationals in contact with lawyers who speak their language and understand their cultural background. James at 31. Or it may entail assuring that a foreign detainee's lawyer has the appropriate kind of experience, such as experience with death penalty cases. *Id.*; *see, e.g., Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (granting habeas corpus relief to Mexican national because his "trial counsel's inexperience in capital litigation caused him to believe" that funds were not available "to properly investigate [the national's] childhood, social history or other aspects of his life," and noting that, if the defendant had obtained consular assistance, "the Government of Mexico would have intervened in the case, assisted with [the national's] defense, and provided resources to ensure that he received a fair trial and sentencing hearing"); Joint Brief for Defendant-Appellant Gregory Madej and Intervenor-Appellant the Consul Gen. for the Rep. of Poland in Chicago at 43-44, *People v. Madej*, 478 N.E. 2d 392 (Ill. 1985) (Polish consulate would have helped death-eligible defendant obtain an attorney with death-penalty experience). *See generally Strickland*, 466 U.S. at 685-86 (recognizing the "crucial role" of counsel, particularly at capital sentencing).

- ***Consular officials help foreign nationals obtain evidence and witnesses located in their home countries.***

Even where a foreign national understands the U.S. legal system and has access to a competent attorney, the foreigner may still be handicapped in presenting his case. "Crucial evi-

dence favourable to the defence may exist only in the defendant's home country but may lie beyond the reach of defence counsel. The gathering of important documents may require the consulate to correspond with other branches of the home government, or may rely on the notarizing function of the consulate for their legal verification." James at 21.

In death penalty cases, for example, the defendant's background and life experiences are often central to the case in mitigation. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524-25, 534-35 (2003). In such cases, "the gathering of mitigation evidence and locating mitigating witnesses" in the foreign national's home country are "[a]mong consular officials most important duties." *Torres v. State*, 120 P.3d 1184, 1188 (Okla. Crim. App. 2005); *see, e.g., LaGrand Case*, 2001 I.C.J. at 491 (noting that German consular officials would have assisted counsel in developing mitigating evidence from the defendants' childhood). Evidence from a foreign national's home country may also be important to the defense in non-capital cases. *See, e.g., United States v. Emuegbunam*, 268 F.3d 377, 387-88 (6th Cir. 2001) (Nigerian consulate stated that delay in notification prevented it from bringing witnesses to the United States in time for trial, and the district court concluded that the inability to call the witnesses could prejudice the defendant).

As these examples suggest, consular involvement can have a significant impact on whether arrested foreign nationals are able to avail themselves of their rights under U.S. law. For instance, after Mexican national Ricardo Aldape Guerra received the death penalty in Texas state court, the Mexican consulate helped him secure pro bono representation from a large law firm. Michael Fleishman, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of its Foreign Nationals in United States Death Penalty Cases*, 20 Ariz. J. Int'l & Comp. L. 359, 371 (2003). The consulate also assisted Guerra in uncovering significant evidence that had not been presented at his trial. *Id.* Utilizing the newly discovered evi-

dence, the firm filed a habeas corpus petition that alleged a variety of prosecutorial misconduct, including pretrial intimidation of witnesses, use of false evidence at trial, and failure to disclosure exculpatory evidence. *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995). The district court granted the petition and set aside Guerra's conviction. *Id.* at 637.

The case of Victor Hugo Saldano, an Argentine arrested and tried in Texas for murder and kidnapping, provides another illustration of the positive impact of consular assistance. The Argentinian consulate, which was monitoring Saldano's trial, informed his counsel that testimony offered by a state witness to support the death penalty was constitutionally impermissible because it urged jurors to consider Saldano's race in determining whether he was a future threat to society. *See* Margaret Mendenhall, *A Case for Consular Notification: Treaty Obligations as a Matter of Life or Death*, 8 Sw. J. L. & Trade Am. 335, 350-51 (2001-02). The consulate then helped Saldano obtain appellate counsel, *id.*, who pursued the issue all the way to this Court. This Court set aside the state court decision that had affirmed Saldano's conviction and sentence. *Saldano v. Texas*, 530 U.S. 1212 (2000).[7]

In contrast, when consular officials are not notified about a foreign national's arrest, the national often fails to invoke basic procedural protections – and usually suffers deleterious consequences as a result. For example, Gregory Madej is a Polish national who was sentenced to death in Illinois even though his consulate was not notified about his arrest or trial. Madej, who was represented by counsel with no death penalty experience, repeatedly failed to take advantage of strategic op-

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[7] On remand, the Texas Court of Criminal Appeals reaffirmed Saldano's conviction and sentence. *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002). Saldano then filed a successful petition for federal habeas corpus, *Saldano v. Cockrell*, 267 F. Supp. 2d 635 (E.D. Tex. 2003), which was upheld on appeal, *Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004).

portunities that would have helped him avoid the death penalty. For example, Madej rejected a proposed plea bargain that provided for only life imprisonment, and he failed to collect or present mitigating evidence at his sentencing hearing. Joint Brief for Defendant-Appellant Gregory Madej and Intervenor-Appellant the Consul Gen. for the Rep. of Poland in Chicago at 43-44, *People v. Madej*, 478 N.E. 2d 392 (Ill. 1985). Sixteen years after Madej was convicted and sentenced to death, the Polish Consulate was notified about his arrest. In connection with Madej's habeas petition, the Consulate stated that it would have helped Madej obtain an attorney experienced in death penalty litigation, and that attorney, among other things, likely would have advised Madej to accept the plea bargain and assisted him in obtaining mitigating evidence. *Id.*

Also instructive is the case of Joseph Faulder, a Canadian who was twice convicted and sentenced to death for a murder that occurred during a robbery. *Faulder v. Johnson*, 81 F.3d 515, 517 (5th Cir. 1996). Faulder, who was later determined to have organic brain damage, "presented no affirmative evidence at the guilt phase of either trial, and no mitigating evidence." Kadish, 18 Mich. J. Int'l L. at 578. The Canadian consulate was not notified about Faulder's plight until after the imposition of the second death sentence. Once informed of Faulder's situation, Canadian officials helped Faulder's attorney locate numerous mitigation witnesses – all of whom were available at the time of Faulder's original trial but none of whom testified in that proceeding. Henry Weinstein, *Foreigners on Death Rows Denied Rights, U.S. Says*, L.A. Times, Dec. 10, 1998, at A1. Canadian officials also stated that, had they been informed of Faulder's arrest at the time it occurred, they would have helped Faulder find an attorney who would have pursued his case aggressively from the beginning and who would have brought out evidence of his mental impairment. *Id.* Given Faulder's diminished capacity, the consulate's effort might have enabled him to avoid the death penalty. *Id.* As these cases illustrate, whether or not a foreign national is noti-

fied of his consular rights can determine whether or not he obtains the basic protections that ensure the fairness of our criminal justice system.

2. *Recognizing that the Convention confers enforceable rights will provide a provide a powerful incentive for the United States to comply with the Convention's consular notification requirements*

Unfortunately, notification of consular rights is the exception rather than the rule in United States. Recent studies indicate that less than five percent of foreign nationals sentenced to death received timely notification of their consular rights. *See* Mark Warren, Human Rights Research, *Foreign Nationals and the Death Penalty in the United States* (May 28, 2005), http://www.deathpenaltyinfo.org/article.php?did=198&scid=31 (concluding that "only 7 cases of complete compliance with Article 36 requirements have been identified so far, out of more than 160 total reported death sentences"); Amnesty Int'l, *United States of America: A time for action – Protecting the consular rights of foreign nationals facing the death penalty*, at 4 (Aug. 2001) (observing that, in "virtually every one" of the 120 cases in which foreign nationals were sentenced to death between the reinstatement of the death penalty and 2001, "the arresting authority failed to inform the nationals of their consular rights"). The rate of consular notification appears to be even lower for non-capital cases. For example, an examination of New York City arrest records from 1997 revealed that 53,000 foreign nationals were arrested, but consulates were notified of the arrests in only *four* cases. *See* Warren, *supra*.

The current environment – in which there is no clearly established enforceable right to consular notification – has thus been ineffective in ensuring that the government complies with its obligations under the Vienna Convention. That should not be surprising. As Justice Holmes long ago recognized, "[l]egal obligations that exist but cannot be enforced are ghosts that are

seen in the law but that are elusive to the grasp." *The Western Maid*, 257 U.S. 419, 433 (1922). Conversely, judicially enforceable individual rights are powerful tools to promote compliance with legal requirements. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 384 (1982) (noting that an individual right to enforce the Commodity Exchange Act provides "a significant incentive for the exchanges to obey the law"); *Cannon*, 441 U.S. at 705-06 (concluding that a private right of action is "necessary to – the orderly enforcement" of Title IX); *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969) (recognizing an enforceable right to compel state compliance with Section 5 of the Voting Rights Act because otherwise the Act "might well prove an empty promise"). By recognizing that the Vienna Convention creates judicially enforceable rights to consular notification and access, the Court can simultaneously honor the Convention's text and reverse this country's unfortunate history of noncompliance with its treaty obligations.

C. Enforceable Rights To Consular Notification and Access Are Critical To The Protection of U.S. Nationals Arrested Abroad

A holding that the Convention confers individually enforceable rights is also important to ensure the fairest possible treatment of U.S. nationals arrested abroad. Consular assistance is critically important to Americans detained in foreign countries. Indeed, consular assistance may be even more vital for U.S. detainees abroad than for foreign detainees in our country. U.S. nationals arrested abroad not only face unfamiliar legal systems but may be more likely than detainees in the United States to confront coercive interrogation or inhumane conditions of detention. Consular involvement guards against those abuses. But U.S. detainees abroad will not seek consular assistance unless other nations comply with their obligations under the Vienna Convention to notify the detainees of their consular rights. And both international law and common sense

teach that foreign nations will not respect their Vienna Convention obligations unless the United States respects its own.

1. Consular notification and assistance are necessary to ensure fair treatment of U.S. nationals detained abroad

Every year, millions of Americans travel to foreign countries or choose to live outside the United States. According to the State Department, "[a]pproximately 3.2 million Americans reside abroad, and Americans make about 60 million trips outside the U.S. each year." Bureau of Resource Management, U.S. Department of State, *FY2004 Performance and Accountability Report* (2004), *available at* http://www.state.gov/s/d/rm/rls/perfrpt/2004/html/39024.htm. Moreover, the number of Americans who venture abroad is increasing. The United States issued a record total of 8.8 million passports in 2004, an increase of 1.5 million from the previous year. *Id.*

Millions of Americans are therefore at risk of being arrested by a foreign criminal justice system. Every year, that risk becomes an unfortunate reality for thousands of U.S. nationals. The State Department's Bureau of Public Affairs estimates that "more than 2,500 American citizens are arrested abroad" each year. Bureau of Public Affairs, U.S. Department of State, *International Travel Safety Information for Students* (2004), *available at* http://www.state.gov/r/pa/prs/ps/2004/29556.htm. Less formal detentions increase that number significantly, so that the total number of Americans arrested or detained abroad annually is almost 6,000. Kevin Herbert, Managing Director of the Office of Overseas Citizens Services, U.S. Department of State, *The Terrorist Threat to American Presence Abroad*, Part II, Threat to Citizens Overseas, University of Virginia, Apr. 12-13, 1999, http://www.healthsystem.virginia.edu/internet/ciag/reports/report_terr_citizens.cfm.

Often "the only people [American detainees] can turn to for help are American diplomats." Statement of R. Nicholas Burns, State Department Spokesperson (Sept. 29, 1995),

http://www.hri.org./docs/statedep/1995/95-09-29.std.html. As the State Department has explained, providing that assistance is the "most important function" of U.S. consular officers. U.S. Department of State, 7 FAM § 412. Indeed, in 2004 alone, consular officials paid 6,920 visits to Americans abroad. Daniel B. Smith, Principal Deputy Assistant Secretary for Consular Affairs, Testimony Before the U.S. House of Representatives, Comm. on International Relations (May 12, 2005), *available at* http://www.house.gov/international_relations/109/smi051205.pdf.

American consular officers provide arrested U.S. nationals with a broad range of assistance, both legal and humanitarian. Consular officers provide U.S. detainees with the names of reputable lawyers and other information about local legal aid. 7 FAM § 422. Consular officials explain the legal and judicial procedures of the foreign government and the detainee's legal rights. *Id.* Consular officers also intervene with foreign governments on behalf of detained Americans, where necessary, to "forestall physical abuse" and "to demand medical attention" and "a prompt investigation" when physical abuse has occurred. *Id.* In addition, consular officers ensure that detained Americans have basic necessities such as food and water, *id.* at § 423.9, offer to contact family or friends, *id.* at § 423.7, and take steps to protect the detainees' personal property, *id.* at § 423.8.

For many U.S. nationals arrested abroad, consular assistance makes the difference between fair treatment and capricious punishment. For example, in December 2004, consular officials helped secure the release from custody of Avnish Bajaj, a U.S. citizen and CEO of an Indian online auction house wholly owned by eBay. Paul Watson, *India Roiled by Internet Sex Case*, Boston Globe, Dec. 22, 2004, *available at* http://www.boston.com/news/world/asia/articles/2004/12/22/india_roiled_by_internet_sex_case. Bajaj was arrested in Delhi after pornographic materials were unwittingly sold on his com-

pany's website. A lower court ordered that Bajaj be held in jail without bail. After receiving notification of his predicament, the American consulate informed high-ranking State Department officials, and the U.S. government placed diplomatic pressure on India to ensure that Bajaj received fair treatment. In addition, consular officials visited him in detention and attended the appellate hearing that resulted in his release. *Avnish Bajaj's Arrest Worries Colin Powell*, Agence France-Presse, Dec. 21, 2004, *available at* http://avnish-bajaj-news.newslib.com/story/1186676.

In stark contrast to Bajaj's case stands the example of Robert Fielding, a U.S. citizen seized from his hotel by Belarusian authorities in 2001. Fielding, who did not receive consular notification or assistance, was "subjected to a 10-hour interrogation by law enforcement officials who just 'happened' to be accompanied by the television cameras of Belarusian National Television . . . . During this entire interrogation process, he was denied the right to legal counsel, forced to sign a statement, and subjected to being filmed by the state-controlled Belarusian National Television that later showed parts of this interrogation on its prime-time national 'news' program 'Rezanans' less than 24 hours after his deportation." Embassy of the United States of America, Embassy Statement on Detention and Deportation of U.S. Citizen Robert Fielding, Aug. 29, 2001, http://minsk.usembassy.gov/html/fielding.html. Moreover, after his brutal interrogation, Fielding was forced to leave Belarus for Poland without the opportunity "to gather any of his personal belongings from his legally-registered residence in Minsk." *Id.*

The ability of U.S. consulates to provide assistance to Americans detained abroad hinges on whether consular officials receive prompt notification of the detentions. As the State Department Foreign Affairs Manual instructs consular officers, "[p]rompt notification is the necessary first step in obtaining early access to the arrestee." 7 FAM § 421. And

early access is the linchpin to ensuring that U.S. detainees receive fair treatment. "With early access to each prisoner [consular officials] can go a long way towards guaranteeing against mistreatment and forced statements at the time of arrest," and can provide timely "information about responsible legal counsel and judicial procedures." Leonard F. Walentynowicz, Bureau of Security and Consular Affairs, U.S. Department of State, U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations, 94 Cong., 1st Sess. Part II, at 6 (1975). The State Department therefore instructs consular officials that "it is essential that [they] obtain prompt notification whenever a U.S. citizen or national is arrested." 7 FAM § 421. And the Department identifies the Vienna Convention as the principal authority through which consular officers can obtain the necessary notification. *Id.* § 421.1; *see id.* § 413.1. Thus, compliance by other nations with their consular notification obligations under the Convention is crucial for the protection of Americans abroad.

2. *Foreign nations will not honor the Vienna Convention's consular notification requirements unless the United States ensures that the requirements are enforced in this country*

Foreign nations are unlikely to comply with the Convention's consular notification requirements unless the United States also complies with those requirements. As this Court has long recognized, "mutuality and reciprocity" are the foundation of international law. *Hilton v. Guyot*, 159 U.S. 113, 228 (1895); *see Souffront v. La Compagnie Des Sucreries De Porto Rico*, 217 U.S. 475, 483 n.9 (1910). It is therefore unreasonable to expect other nations to comply with their treaty obligations if the United States refuses to comply with its own. That conclusion follows not only from basic principles of international law but from fundamental precepts of human relations. *See* H.T.D. Rost, *The Golden Rule: A Universal Ethic* (1986). Thus, if the United States does not ensure that foreign

nationals arrested in this country are notified of their consular rights, other nations are likely to respond in kind.

The State Department is well aware of that reality. Then-Secretary of State Madeline Albright described the situation succinctly in a 1998 letter to then-Governor of Texas George W. Bush. The Secretary observed that "[w]e must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad." *See* Sandra Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 Leiden J. Int'l L. 367, 376 (2002) (quoting Secretary of State Albright). Similarly, the State Department instructs state and local law enforcement officials that their rigorous adherence to the Convention's requirements "will permit the United States . . . to continue to expect rigorous compliance by foreign governments with respect to United States citizens abroad." U.S. Department of State, Consular Notification and Access at 13.

The same sentiments have been echoed by numerous judges reviewing legal challenges by criminal defendants who were denied their consular rights. As Judge Butzner eloquently stated in *Breard v. Pruett*, "United States citizens are scattered about the world as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example." 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring); *see also United States v. Carrillo*, 70 F. Supp. 2d 854, 860 (N.D. Ill. 1999) ("If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens."); *Flores v. State*, 994 P.2d 782, 788 (Okla. Crim. App. 1999) (Chapel, J., concurring) ("Why should Mexico, or any other

signatory country, honor the Treaty if the U.S. will not enforce it? The next time we see a *60 Minutes* piece on a U.S. citizen locked up in a Mexican jail without notice to any U.S. governmental official we ought to remember these cases.").

There is, of course, no guarantee that other nations will respect the rights of U.S. nationals under the Vienna Convention, no matter how scrupulously the United States respects the rights of foreign nationals, and no matter how this Court rules in these cases. But rigorous compliance with the Convention by the United States will provide a strong incentive for other nations to comply. And recognition that the Convention confers judicially enforceable rights will provide a powerful mechanism to ensure compliance by the United States. Even more important, the existence of individual rights is firmly grounded in the text of the Convention and supported by other interpretive considerations. This Court should therefore hold that the Convention creates enforceable, individual rights to consular notification and access.

CONCLUSION

For the foregoing reasons, as well as those set forth in the briefs of petitioners, the judgments of the Supreme Courts of Virginia and Oregon should be reversed.

Respectfully submitted.

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Petitioner,

v.

STATE OF OREGON,
Respondent.

MARIO BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia and the Supreme Court of Oregon

BRIEF OF *AMICI CURIAE* BAR ASSOCIATIONS, HUMAN RIGHTS ORGANIZATIONS AND OTHER LEGAL GROUPS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

This Brief of *Amici Curiae* is respectfully submitted in support of Petitioners by several organizations, including bar associations, human rights and civil rights organizations, and other legal groups.[1] *Amici* include: Amnesty International USA, Bar Human Rights Committee of England & Wales, Center for Justice & Accountability, The Constitution Project, Hispanic National Bar Association, Human Rights Advocates, Human Rights First, Human Rights Watch, League of United Latin American Citizens, Mexican American Bar Association, Mexican American Legal Defense and Educational Fund, Minnesota Advocates for Human Rights, and the Robert F. Kennedy Memorial Center for Human Rights.

Amnesty International USA is the U.S. section of Amnesty International, a Nobel Prize-winning organization with more than 1.8 million members, supporters and subscribers in over 150 countries and territories throughout the world. Amnesty International's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights. Amnesty International is privately funded and is independent of any political

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[1] *Amici Curiae* certify that this brief is filed with written consent of all parties, said consents having been lodged with the Court. Sup. Ct. R. 37.2(a). They also certify that no counsel for either party authored the brief in whole or in part and that no person or entity, other than *amici curiae*, their members, and their counsel, made any monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

ideology or economic interest. In line with the organization's international focus, Amnesty International USA joins this brief on matters of international law.

The Bar Human Rights Committee of England & Wales (BHRC) is an independent group of specialist advocates and experts who work on a voluntary basis to develop law and human rights protection throughout the world. BHRC objectives are: supporting and protecting lawyers and judges who are threatened or oppressed in their work; upholding the rule of law and internationally recognized human rights standards; furthering interest in and knowledge of human rights and the laws relating to human rights; advising, supporting and co-operating with other organizations and individuals working for human rights; and advising the Bar Council in connection with any human rights issue.

The Center for Justice & Accountability (CJA) is a non-profit legal advocacy center that works to prevent torture and other severe human rights abuses around the world by helping survivors hold perpetrators accountable. CJA represents survivors and their families in actions for redress that call for the application of human rights standards under United States and customary international law.

The Constitution Project seeks consensus solutions to difficult legal and constitutional issues. It does this through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. The Constitution Project has earned wide-ranging respect for its expertise and reports, including practical material designed to make constitutional issues a part of ordinary political debate. It has testified before federal and state legislative committees, and its work has been cited in numerous reports and studies by government agencies, the media, and law and policy organizations. The Constitution Project has released a report, *Mandatory Justice: The*

Death Penalty Revisited, which recognizes the role of the Vienna Convention in protecting the rights of foreign nationals in capital cases. The Constitution Project recognizes the implications of this case for protecting these rights.

The Hispanic National Bar Association (HNBA) is a national non-profit association representing the interests of Hispanic American members of the legal community in the United States and Puerto Rico. Founded in 1972, HNBA now represents thousands of Hispanic Americans in the legal profession. Its primary objectives are to increase professional opportunities for Hispanics in the legal profession and to address issues of concern to the national Hispanic community. The HNBA is a member of the National Hispanic Leadership Agenda and also holds a seat in the American Bar Association House of Delegates. Proper application of Article 36 of the Vienna Convention is of particular interest to the HNBA, given its largely bilingual membership and its commitment to the rule of law. Its signatory representative was a participant in the Vienna Convention Discussion Group, which led to the decision of the Oregon Department of Justice to adopt new policies to improve compliance with the Convention, as noted in the letter of April 25, 2002 from the Deputy Attorney General to William Howard Taft IV, Legal Advisor in the United States Department of State.

Human Rights Advocates is a non-profit organization that provides education about the application of international human rights in both domestic and international fora. Its ultimate objective is to advance the cause of human rights so that basic protections are afforded to all individuals. Human Rights Advocates has appeared as *amicus curiae* before a number of U.S. courts including the United States Supreme Court, the Second, Fifth, Ninth, and Tenth Circuit Courts of Appeals, and the California

Supreme Court. Human Rights Advocates also appears before international fora including the Inter-American Commission on Human Rights, the United Nations Commission on Human Rights, and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

Human Rights First works in the United States and abroad to create a more secure and humane world by advancing justice, human dignity, and respect for the rule of law. It protects refugees in flight from persecution and repression and in seeking legal relief in the United States; works to ensure that domestic legal systems incorporate stronger human rights protections; helps build a stronger international system of justice and accountability for the worst human rights crimes; works with and supports human rights activists who fight for basic freedoms and peaceful change at the national level; and promotes fair economic practices through stronger safeguards for workers' rights. Human Rights First has filed numerous *amicus* briefs before the U.S. Supreme Court and other U.S. courts and international bodies.

Human Rights Watch (HRW) is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. HRW has filed *amicus* briefs before various bodies, including U.S. courts and international tribunals.

The League of United Latin American Citizens

(LULAC) is the largest and oldest Hispanic civil rights organization in the United States. With over 115,000 members in virtually every state of the nation, LULAC advances the economic condition, educational attainment, political influence, health, and civil rights of Hispanic Americans. For more than 75 years, LULAC's members have sought to ensure the civil rights of Hispanics throughout the United States and foster respect for the rule of law. We believe in the democratic principle of individual freedom and are obligated to promote, protect and assure the constitutional and statutory rights of all Hispanics, regardless of immigration status.

The Mexican American Bar Association (MABA) is one of the most prominent and largest Latino bar associations in Southern California and the nation. MABA is a volunteer entity, with its success resting on the commitment of its members and supporters. MABA members include over 800 attorneys, judges, politicians, and business people of various ethnic backgrounds. Aside from being pacesetters in their respective fields of law, MABA members maintain prominent roles in local government and in all media avenues such as radio, television and journalistic mediums. MABA is committed to the advancement of Latinos in the legal profession and the empowerment of the Latino community through service and advocacy.

The Mexican American Legal Defense & Educational Fund (MALDEF) is a national non-profit organization whose mission is to protect the civil rights of the more than 40 million Latinos living in the United States. Through its work, MALDEF recognizes the importance of ensuring that all foreign nationals are assured the rights afforded by law, including the right to confer with their native consulates.

Minnesota Advocates for Human Rights (Minnesota Advocates) is a volunteer-based non-profit organization

committed to the impartial promotion and protection of international human rights standards and the rule of law. Minnesota Advocates conducts a broad range of innovative programs to promote human rights in the United States and around the world, including human rights monitoring and fact finding, direct legal representation, education and training, and publications. Minnesota Advocates has produced more than 50 reports documenting human rights practices in more than 25 countries; educated more than 10,000 students and community members on human rights issues; and provided legal representation to thousands of low-income individuals. Minnesota Advocates has previously submitted *amicus curiae* briefs in numerous cases, including cases before the Inter-American Court of Human Rights.

The Robert F. Kennedy Memorial Center for Human Rights (CHR) is a non-profit organization working to advance Robert F. Kennedy's vision of social justice by promoting the full spectrum of human rights throughout the world. The annual RFK Human Rights Award honors individuals who, at great risk, stand up to government oppression in the nonviolent pursuit of respect for human rights. The CHR develops and carries out projects, which enhance and complement the social change agendas of the laureates. Their work includes advocacy and legal projects with the U.S. and foreign governments, international agencies and other human rights organizations. The CHR has promoted the respect and implementation of the legal norms related to human rights at a domestic and international level, including cases before the International Labor Organization, the Inter-American Commission on Human Rights, and the World Bank Inspection Panel, encouraging both the U.S. and foreign governments to respect the human rights of their citizens and foreign nationals within their respective territories. These efforts

will have little substance so long as the United States continues to ignore international law regarding the rights of foreign nationals in its territory.

Each of these organizations recognizes the importance of the rule of law and U.S. compliance with international law. *Amici* have observed firsthand the negative consequences that arise when federal, state, and local governments fail to comply with international law. Regrettably, such issues arise on an almost daily basis. While the United States has ratified the Vienna Convention on Consular Relations, *done* Apr. 24, 1963, 21 U.S.T 77, 596 U.N.T.S. 261 ("Vienna Convention"), state and local governments have failed to comply fully with its obligations. Noncompliance is compounded by the refusal of federal courts to provide meaningful review and reconsideration of Vienna Convention violations. Without appropriate guidance from this Court, state courts and lower federal courts will continue to disregard international law and U.S. treaty obligations as the Supreme Courts of Virginia and Oregon have done.

While *Amici* pursue and protect a wide variety of legal interests, they all share a deep commitment to the rule of law. Thus, the participation of *Amici* will assist this Court in understanding the negative implications and practical consequences of U.S. failure to comply with the Vienna Convention.

SUMMARY OF ARGUMENT

Long before these cases arose, the Executive and Legislative branches of the United States government made the policy choice entrusted to them by the United States Constitution to ensure reciprocal protection for U.S. citizens abroad by negotiating and ratifying the Vienna Convention. Article 36 of the Vienna Convention provides

that foreign nationals must be informed of their right to seek consular assistance when detained.[2] It is firmly established that Article 36 creates individual rights and that the United States is legally obligated to recognize these rights in its courts.

Respect for the rule of law is an essential component of U.S. foreign policy. Foreign governments expect, therefore, that the United States will comply with its obligations under the Vienna Convention, a duly ratified treaty. Indeed, it is in our national interest to do so. The Vienna Convention protects vulnerable migrants in our country. But it also protects U.S. citizens abroad, including tourists, business travelers, and military personnel. Failure to adhere to the obligations set forth in the Vienna Convention will undermine consular assistance in the United States and violations will inevitably be replicated abroad.

In *Bustillo v. Johnson*, No. 042023 (Va. March 7, 2005) and *State v. Sanchez-Llamas*, 108 P.3d 573 (Or. 2005), two state courts have completely disregarded the Vienna Convention. Quite simply, the failure of these courts to respect U.S. treaty obligations undermines the rule of law,

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[2] These branches also negotiated and ratified the related Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *done* Apr. 24, 1963, 21 U.S.T. 77 ("Optional Protocol"). The Optional Protocol vests the International Court of Justice ("ICJ") with jurisdiction to resolve disputes over the interpretation and application of the Vienna Convention. Although the United States recently withdrew from the Optional Protocol, this withdrawal does not change the U.S. agreement to fulfill its obligations under the Vienna Convention. Nor does the U.S. decision to withdraw from the Optional Protocol change the U.S. position on the Vienna Convention itself: specifically, that the substantive guarantees of the Vienna Convention should be enforced by local, state, and federal authorities.

long a central feature of U.S. foreign policy. These state court decisions also threaten the ability of consular officials to effectively protect the interests of their nationals. Because the protections afforded by the Vienna Convention are reciprocal in nature, noncompliance by the United States will be replicated abroad, harming the interests of U.S. citizens that travel and work around the world.

For these reasons, this Court should reverse the judgments of the Supreme Courts of Virginia and Oregon and grant relief that is consistent with the obligations set forth in the Vienna Convention and with the U.S. policy of promoting a unified rule of law that respects our international obligations.

ARGUMENT

I. RESPECT FOR THE RULE OF LAW IS AN IMPORTANT COMPONENT OF U.S. FOREIGN POLICY

Throughout its history, the United States has consistently asserted that violations of international law have serious consequences for international order.[3] No less a realist than former Secretary of State Henry A. Kissinger

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[3] The United States has repeatedly asserted that international law is "the web of mutual obligation which binds us together . . . [and] shields us from chaos and from disorder." Memorial of United States of America, United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1982 I.C.J. Pleadings 228 (Dec. 29, 1979) (*quoting* Secretary of State Cyrus Vance, Remarks to U.N. Security Council). Moreover, the failure to redress violations of international norms "promotes repetition" of violations, eroding international order. Or. Arg. of United States, United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1982 I.C.J. Pleadings 255.

has noted that "[t]he United States is convinced in its own interest that the extension of legal order is a boon to humanity and a necessity." Henry A. Kissinger, *International Law, World Order, and Human Progress*, 73 Dep't St. Bull., 353, 354 (Sept. 8, 1975). *See also* Charles N. Brower, Acting Department of State Legal Adviser, *International Law as an Instrument of National Policy*, 68 Dep't St. Bull., 644, 644 (May 21, 1973) ("States comply with [international] law . . . because it is politic to do so."); John Foster Dulles, Testimony Before Congress Regarding the Ratification of the U.N. Charter, *quoted in* Ambassador Madeleine K. Albright, *Enforcing International Law*, Speech Before the Philadelphia Bar Association at 9 (June 15, 1995), *at* http://dosfan.lib.uic.edu/ERC/law/press_statements/950615.html ("As a nation, we have, more than any other, striven for the supremacy of law as an expression of justice. Now, we are seeking to establish world order based on the assumption that the collective life of nations ought to be governed by law—law as formulated in the Charter of the U.N. and other international treaties, and law as enunciated by international courts.").

In addition, the United States has promoted respect for international law because it reflects important American values; "[i]t is a repository of our experience and our idealism." Kissinger, *supra*, at 354. Accordingly, U.S. administrations have repeatedly reaffirmed the commitment of the United States to honoring its international law obligations. *See, e.g.*, Madeleine K. Albright, *U.S. Efforts to Promote the Rule of Law*, Remarks at the Condon-Falkner Distinguished Lecture, University of Washington School of Law, *in* U.S. Dep't of St. Dispatch, Nov. 1998, at 6 ("Law is a theme that ties together the broad goals of our foreign policy."); Letter from President Ford to Seymour J. Rubin, *reprinted in* States-International Status, Attributes, and Types: Rights and Duties of States: Nonintervention in

Internal Affairs 1975 *Digest* § 1, at 16 ("It is my intention that the Government of the United States shall observe international law and endeavor to promote its strengthening in all areas to which it applies."); Kissinger, *supra*, at 362 ("[D]edication to international law has always been a central feature of our foreign policy.").

In recent years, the Bush administration has reaffirmed the important role that the rule of law plays in U.S. foreign policy. U.S. Secretary of State Condoleezza Rice has emphasized the importance of the rule of law in promoting stability and cooperation throughout the world:

> America is a country of laws. When we observe our treaty and other international commitments, our country -- other countries are more willing to cooperate with us and we have a better chance of persuading them to live up to their own commitments. And so when we respect our international legal obligations and support an international system based on the rule of law, we do the work of making the world a better place, but also a safer and more secure place for America.

U.S. Secretary of State Condoleezza Rice, Remarks at the Annual Meeting of the American Society of International Law (Apr. 1, 2005), *at* http://www.state.gov/secretary/rm/2005/44159.htm. Similarly, the U.S. Deputy Permanent Representative to the United Nations noted in remarks to the U.N. Security Council:

> [E]stablishing and maintaining the rule of law has been an enduring theme of

> American foreign policy for over two centuries. Notably, the U.S. Constitution specifically provides that treaties shall be the supreme law of the land. We therefore do not enter into treaties lightly because we believe the importance of the rule of law to a successful system of peace cannot be overstated.

Ambassador James B. Cunningham, United States Deputy Permanent Representative to the United Nations, Statement on Justice and the Rule of Law to the U.N. Security Council at 1 (Sept. 24, 2003), *at* http://www.un.int/usa/03_147.htm. Thus, promotion of the rule of law historically has been a defining value of U.S. foreign policy and a key strategy for promoting peace and stability throughout the world.

> As a nation founded by law, the United States is the unflagging champion of the rule of law. By working together in support of the rule of law, we believe the international community can strengthen the peace and help conflict-ridden societies build a better future. For two hundred years, this has been our firm conviction and practice, and it will remain our first article of faith.

Id. at 2. *See also* Marc Grossman, Under Secretary for Political Affairs, U.S. Department of State, Remarks to the Center for Strategic and International Studies at 1 (May 6, 2002), *at* http://www.state.gov/p/9949.htm ("Let me get right to the point. . . . Here's what America believes in: We believe in justice and promotion of the rule of law.").

Foreign governments, therefore, expect that the United

States will be a leader in complying with the obligations set forth in the Vienna Convention. In so doing, it demonstrates to "the world that the United States does indeed take its international law responsibilities seriously." William Howard Taft IV, U.S. Department of State, Legal Adviser, Remarks to the National Association of Attorneys General at 5 (March 20, 2003), *at* http://usinfo.state.gov.

In sum, the interests of all persons – from foreign nationals in the United States to Americans abroad – are best served by adherence to the rule of law as embodied in the Vienna Convention. Failure to adhere to the rule of law would compromise this most American value and would undermine the work that *Amici* do.

II. THE CONSULAR ASSISTANCE PROVISIONS OF THE VIENNA CONVENTION ARE ESSENTIAL FOR PROTECTING THE RIGHTS OF FOREIGN NATIONALS

Governments have long recognized the importance of consular relations. Luke Lee, Consular Law and Practice 3-7 (2d ed. 1991); Oppenheim's International Law 1132-34 (Robert Jennings and Arthur Watts eds., 9th ed. 1992); Constantin Economides, *Consuls*, *in* 1 Encyclopedia of Public International Law 770 (Rudolf Bernhardt ed. 1992). The Vienna Convention on Consular Relations, which was adopted in 1963 and has been ratified by 168 countries, has been referred to as "undoubtedly the single most important event in the entire history of the consular institution." Lee, *supra*, at 27.

The Vienna Convention defines and guarantees consular rights, privileges, and duties among signatory

states.[4] One of the most important responsibilities of consular officials is to protect their nationals. Accordingly, Article 36(1)(a) provides that consular officials shall be free to communicate with, and have access to, their nationals at all times. Foreign nationals shall have the same freedom of communication and access to consular officials. A particularly sensitive issue arises when a foreign national is detained by law enforcement officials. In these cases, Article 36(1)(b) of the Vienna Convention provides that law enforcement officials of signatory states must notify detained foreign nationals that they have a right to communicate with, and have access to, their consular officials. If the detained national makes such a request, the appropriate consular post must be notified. In addition, Article 36(1)(c) grants consular officials the right to visit, converse and correspond with detained foreign nationals and to arrange for their legal representation. Finally, Article 36(2) provides that the laws and regulations of each signatory state must enable full effect to be given to these rights. In sum, Article 36 of the Vienna Convention serves two broad goals. Through consular assistance, foreign nationals can gain a greater awareness of the nature and scope of the legal proceedings that affect them. At the same time, consular assistance allows foreign governments to monitor the safety and fair treatment of their nationals in such proceedings.

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[4] Article 5 of the Vienna Convention lists a number of consular functions. These cover a wide variety of responsibilities, including: furthering the development of commercial, economic, cultural and scientific relations between signatory states; issuing passports and travel documents; serving as a notary and civil registrar; and transmitting judicial documents or executing letters rogatory or commissions to take evidence.

It is essential to recognize the purpose of consular assistance when interpreting Article 36.[5] Foreign nationals are at a distinct disadvantage when detained by law enforcement officials.[6] Indeed, migrants are a particularly vulnerable group.[7] They may have a poor command of the

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[5] It is a fundamental canon of interpretation that "[a]n international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose." Restatement (Third) of the Foreign Relations Law of the United States § 325(1) (1987). *See also* Norfolk Southern Ry. v. James N. Kirby, Pty Ltd., 125 S. Ct. 385, 397 (2004) *citing* Green v. Biddle 21 U.S. 1, 89 (1823) ("[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded.").

[6] *See, e.g.*, Amnesty International, United States of America: Osvaldo Torres, Mexican National Denied Consular Rights, Scheduled to Die (Apr. 2, 2004), *available at* http://web.amnesty.org/library/Index/ENGAMR510572004. ("A primary task of all consuls is to render assistance to their citizens abroad and to see that they receive fair, equal and humane treatment while in custody. Consular access and assistance are indispensable whenever foreign nationals face prosecution and incarceration under local legal systems, especially when a death sentence may result. Timely consular intervention ensures that foreign detainees understand their legal rights and have the means to mount a proper defence.").

[7] Unsurprisingly, agreements concerning the rights of migrants emphasize the significance of consular assistance. For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *entered into force* Dec. 18, 1990, art. 16(7) (Dec. 18, 1990), requires that consular notification information be provided to a migrant worker or a member of his or her family when arrested or detained in other manner. Significantly, the provision is almost identical to Article 36 of the Vienna Convention. *See also* U.S. Department of State, Implementing the Summit of the Americas Migrant Workers Initiative (Apr. 7, 2000) ("[T]he United States takes the position that all foreign nationals are entitled to

English language and will likely be unfamiliar with the U.S. criminal justice system. Their understanding of the entire criminal process, including the role of law enforcement officials, public defenders, and judges, may be profoundly influenced by experiences in their countries of origin. Accordingly, consular officials act as a cultural bridge to foreign nationals. While consular officials do not provide legal advice, they provide foreign nationals with critical information that allows them to understand any legal advice provided by defense attorneys. Thus, consular assistance is fundamentally and qualitatively distinct from assistance provided by defense counsel.

In light of these considerations, it is not surprising that the International Court of Justice has indicated that Article 36 creates individual rights and that signatory states must protect these rights.[8] On two occasions, the ICJ has definitively interpreted the Vienna Convention in cases involving foreign nationals who were not informed of their right to seek consular assistance in the United States.[9] *See LaGrand Case* (F.R.G. v. U.S.) 2001 I.C.J. 104 (June 27) ("*LaGrand*"); *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. (March 31) ("*Avena*").

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consular notification and access, regardless of their visa or immigration status in the United States. Thus 'illegal' aliens have the same rights to consular assistance as do 'legal' aliens. There is no reason, for purposes of consular notification, to inquire into a person's legal status in the United States.").

[8] To reiterate, the U.S. decision to withdraw from the Optional Protocol has no bearing on the ICJ's authoritative and binding interpretations of the Vienna Convention.

[9] The opinions of the International Court of Justice are available at www.icj-cij.org.

In June 2001, the ICJ considered the Vienna Convention in an action filed by Germany against the United States. *LaGrand*, *supra*. In *LaGrand*, the ICJ held that Article 36(1) of the Vienna Convention creates individual rights and the clarity of these provisions "admits of no doubt." *LaGrand*, para. 77. The ICJ went on to find that the United States had violated those rights and that procedural default rules could not be used to bar a defendant from making a Vienna Convention claim. *Id.* para. 91.

In March 2004, the ICJ considered the Vienna Convention in an action filed by Mexico against the United States. *Avena*, *supra*. In *Avena*, the ICJ affirmed that the Vienna Convention creates individual rights. *Avena*, para. 40. It then held that the United States violated the rights of fifty-one Mexican nationals. *Id.*, para. 153. To remedy these violations, the ICJ ruled that the United States must provide "by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" and take into account the rights set forth in Article 36 as well as relevant portions of the *Avena* judgment. *Id.*, para. 153(9). The ICJ specified that review and reconsideration must be effective and provide "a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration." *Id.*, para. 139. The ICJ also reaffirmed that the procedural default rule cannot be used to preclude a defendant from raising a Vienna Convention violation. *Id.*, para. 134. Application of procedural default rules would effectively nullify the right to review and reconsideration as mandated by the ICJ. Significantly, the ICJ stated that its conclusions applied to all foreign nationals subject to similar situations in the United States.

> To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

Id., para. 151.

In sum, the Vienna Convention is essential for protecting the rights of foreign nationals. As a signatory to the Vienna Convention, the United States is obligated to protect these rights. But this has not occurred.

III. FAILURE TO COMPLY WITH THE VIENNA CONVENTION WILL UNDERMINE CONSULAR ASSISTANCE IN THE UNITED STATES AND VIOLATIONS WILL BE REPLICATED ABROAD

Over thirty years ago, the United States, through the power granted to its Executive and Legislative branches of government by the United States Constitution, made the policy choice to sign and ratify the Vienna Convention,

making it and its attendant provisions the supreme law of the land. *See* U.S. Const. art. II, § 2, cl. 2 & art. VI, cl. 2.

On April 24, 1963, the United States signed the Vienna Convention. The Senate subsequently approved the Vienna Convention on October 22, 1969, and it was formally ratified on November 12, 1969. The instrument of ratification was deposited on November 24, 1969, and it entered into force for the United States on December 24, 1969. As the U.S. State Department has indicated, the Vienna Convention creates obligations that are binding on federal, state, and local governments. *See* U.S. Dep't of St., *Consular Notification and Access* 44 (2005), *available at* http://travel.state.gov/pdf/CNA_book.pdf.[10]

The consular posts of governments throughout the world, including those of the United States, follow a settled body of procedures to implement the rights afforded by the Vienna Convention for their respective nationals detained abroad. In the event a national is arrested or otherwise detained within a foreign country, Paragraph 1 of Article 36 of the Vienna Convention sets out that "consular offices shall have the right to visit a national . . . who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna

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[10] The United States became obligated to comply with the Vienna Convention immediately upon ratification, and no implementing legislation was necessary. Upon submitting the Vienna Convention to the Senate, the Executive branch stated that the treaty was "entirely self-executive [sic] and does not require any implementing or complementary legislation." S. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. at 2 & 5 (1969) (appendix) (statement by J. Edward Lycerly, Deputy Legal Adviser). More recently, the U.S. State Department has indicated that "[i]mplementing legislation is not necessary . . . because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers." Consular Notification and Access, *supra*, at 44.

Convention, art. 36, para. 1(c).

All U.S. Foreign Service posts are instructed to ensure that the protections of the Vienna Convention are provided to U.S. citizens abroad. *See* U.S. Dep't of St., 7 *Foreign Affairs Manual*, *available at* http://travel.state.gov/pdf/CNA_book.pdf. As our consular officials are informed, "[f]ew of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail." *Id.* § 412 (Sept. 1, 2004). U.S. policy includes the prompt delivery of key information to detained individuals after their arrest. These materials include information regarding judicial procedures the individual is likely to experience, § 415.3 (Sept. 1, 2004), and tailored lists of lawyers with details including languages spoken and specialties. *Id.*, § 415.4 (Sept. 1, 2004); § 991 (Aug. 30, 1999); § 992 (Aug. 30, 1994). Under the State Department's *Foreign Affairs Manual*, consular officers are expected "to be particularly active in, and to fully engage in, the [detained individual's] case during the often-lengthy pretrial period." *Id.*, § 432 (Aug. 26, 2004). The *Foreign Affairs Manual* also indicates that consular officers should frequently visit detained nationals to "monitor whether attorneys retained by U.S. inmates are in contact with them and rendering them appropriate and adequate counsel and other legal services" as well as to "keep prisoners updated on any developments that may relate to their cases such as information obtained from defense counsels, prosecutors, [and] judges." *Id.*, § 433.1 (Aug. 26, 2004). These practices continue into the appellate stage, where U.S. policy instructs consular officers to continue providing appropriate services, including acting as a liaison to the detained individual's attorney and judicial authorities. *Id.*, § 454 (Oct. 28, 2004).

U.S. consular posts are not unique in the services they

provide. For example, Mexican consular officials offer specific assistance to Mexican nationals detained in the United States. *See Torres v. Oklahoma*, No. PCD-04-442, at 10 (Okla. Crim. App. May 13, 2004) (Chapel, J., specially concurring). Pursuant to Mexico's procedures, "[c]onsular officials monitor defense counsel's efforts, speak regularly with defense counsel, the defendant and his family, and attend court proceedings." *Id.* (Chapel, J., specially concurring). Consular officials also assist in gathering evidence and providing funds for experts, investigators, DNA testing, and jury consultants. *See id.* at 10-11 (Chapel, J., specially concurring). The Mexican government also "obtains and provides official documents from institutions in Mexico such as schools and hospitals, searches for criminal records, and assists attorneys traveling in Mexico with logistical support, translators, and witness identification and preparation." *Id.* at 11 (Chapel, J., specially concurring).

If U.S. courts fail to honor the Vienna Convention, the procedures developed by foreign governments to assist and protect the rights of their citizens are of little benefit. These same rights afforded by the Vienna Convention to Americans abroad would also be jeopardized. The protections of the Vienna Convention are reciprocal in nature, and U.S. noncompliance will inevitably be replicated abroad. This basic feature of international law – its reciprocal nature – is recognized and accepted by the United States.[11] The U.S. Legal Adviser has acknowledged the reciprocal nature of the Vienna Convention:

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[11] As the U.S. government has repeatedly asserted "[r]eciprocity . . . underlies all relations between nations." Brief of the United States at 17 n.11, *Boos v. Barry*, 485 U.S. 312 (1988) (arguing that special security restrictions around foreign embassies were justified as a

> These obligations were all entered into as part of a very aggressive effort of the United States Government to protect American citizens abroad. To get protection for Americans abroad in our treaties, it was necessary to provide reciprocal protections to foreign nationals in the United States. We obviously can't insist that other countries comply and then not comply ourselves. So it is both right and fair that we comply.[12]

Taft, *supra*, at 15. Significantly, the *Foreign Affairs Manual* also recognizes the reciprocal nature of Vienna

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necessary part of our reciprocal obligations under the Vienna Convention on Diplomatic Relations and asserting that in "appealing to the justice and the humanity of [other] governments to protect our embassies. . . at least we must show some intent upon our part to treat their embassies and their consulates in our country the same way."). *See also* Geofroy v. Riggs, 133 U.S. 258, 271 (1890) ("It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.").

[12] A similar statement was issued by the U.S. Department of State in a case involving a Paraguayan national who was executed in Virginia and who was never informed of his Vienna Convention rights. According to the Department of State, "[w]e fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard." Press Statement by James P. Rubin, Spokesman, U.S. Department of State, Released in Asuncion, Paraguay (Nov. 4, 1998), *available at* http://secretary.state.gov/www/briefings/statements/1998/ps981104.html.

Convention obligations and the implications of non-compliance in the United States. It acknowledges that foreign governments may not comply with Vienna Convention obligations because "U.S. authorities do not always promptly notify that country's consular representatives of the arrest of one of their nationals." U.S. Dep't of St., 7 *Foreign Affairs Manual* § 421.2-3 (Sept. 3, 2004). In these situations, U.S. consular officials are instructed to point out that "[e]ven where this might be true, it does not exempt the host government from its treaty obligations. Two wrongs do not make a right. We should all work toward improved compliance with consular notification obligations." *Id.* at 421.2-3(a).

There are many reasons why countries comply with international law, "including the unarticulated recognition by states generally of the need for order, and of their common interest in maintaining particular norms and standards . . . ." Restatement (Third), *supra*, at pt I (intro. note). Reciprocity also promotes cooperation and compliance. Accordingly, the United States must recognize the consequences of violating the Vienna Convention, both for the national interest and for the well-being of its citizens.

CONCLUSION

In *The Western Maid*, 257 U.S. 419 (1922), Justice Holmes noted that "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *Id.* at 433. This Court must affirm and give effect to the obligations of the United States under the Vienna Convention or risk transforming the rule of law into a ghostly apparition that is seldom seen and never heard. This latter outcome does not serve the interests of the United States, the interests of its citizens, or the *Amici*,

who seek to promote respect for the rule of law in their own work on a daily basis.

For these reasons, this Court should reverse the judgments of the Supreme Courts of Virginia and Oregon and grant relief that is consistent with the obligations set forth in the Vienna Convention.

Dated: December 20, 2005

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No. 04-10566

IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

vs.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Does the Vienna Convention convey individual rights of consular notification and access to a foreign detainee enforceable in the courts of the United States?

2. Does the state's failure to notify a foreign detainee of his rights under the Vienna Convention result in the suppression of his statements to police?

This brief *amicus curiae* addresses only Question 2.

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IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

vs.

STATE OF OREGON,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, petitioner seeks to suppress evidence on a ground which has little, if anything, to do with the reliability of that evidence. He seeks it in a case where it is doubtful whether the violation at issue occurred prior to his statement

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

and where he probably would have made his statement even if given the requisite advisement immediately upon arrest. Nothing in the Vienna Convention or the International Court of Justice decision requires suppression of such a statement, and the resulting interference with the truth-seeking function of the trial is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

We take the facts pertinent to the issues in this brief primarily from the Brief for Petitioner. In the early morning of December 18, 1999, police responded to a call that defendant, while heavily intoxicated, had threatened two women with a gun. Brief for Petitioner 3. The police ordered defendant to drop the gun, but he exchanged gunfire with the police, wounding one of them in the leg. He was then arrested, some time between 3:00 a.m. and 3:48 a.m. See *ibid.*

Defendant was questioned at 4:36 a.m. The police used an interpreter and advised him of his *Miranda* rights. See *id.*, at 3-4. Defendant contends that the police learned that he was a Mexican national at this time, but they did not inform him that he had a right to notify the Mexican Consulate. See *id.*, at 6. The State disputes that the police learned of his nationality prior to questioning. Brief for Respondent 4-5. Questioning was interrupted at times for medical care and lunch. It concluded at 12:45 p.m. See Brief for Petitioner 4-5. That is approximately eight hours after defendant claims the police learned he was a Mexican national.

At trial, defendant moved to suppress his statements on *Miranda*, due process, and Vienna Convention grounds. The trial court denied the motion. The Court of Appeals affirmed without opinion. See *id.*, at 6-7; *State* v. *Sanchez-Llamas*, 191 Ore. App. 399, 84 P. 3d 1133 (2004) (Table). The Oregon Supreme Court granted discretionary review, limited to the Vienna Convention issue. See *State* v. *Sanchez-Llamas*, 338 Ore. 267, 269, and n. 2, 108 P. 3d 573, 574, and n. 2 (2005).

The court "conclude[d] that Article 36 of the VCCR does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding." *Id.*, at 276, 108 P. 3d, at 578. This Court granted certiorari on November 7, 2005, limited to the Vienna Convention issue and excluding the Fifth/Fourteenth Amendment claim.

SUMMARY OF ARGUMENT

The statements of petitioner which were introduced as evidence in this case were not the "fruit" of the violation of the Vienna Convention. Notification of the consulate was not yet due at the time of the statement. Informing the defendant of his right to notice may or may not have been overdue at that time, but in any event would have been highly unlikely to have made any difference in his decision to make the statement. No prejudice has been shown within the meaning of *Avena*.

Suppression of valid, probative evidence as a means of influencing police behavior is a discredited relic of a bygone era. Although the *Mapp* and *Miranda* rules hang on by virtue of *stare decisis*, they should not be expanded.

A consensus of decisions from courts of other parties to the Vienna Convention that a violation requires suppression would be valid persuasive authority that suppression is a treaty obligation of the United States, but no such consensus exists. *None* of the cases cited by *amici* NACDL & LCA so hold, and *amicus* CJLF has found none. The dearth (and possibly complete absence) of such authority implies the opposite. The treaty does not require suppression of arrestee statements. Absent a requirement in the treaty, a federal statute, or the Constitution itself, this Court has no jurisdiction to impose the requirement on state courts.

ARGUMENT

This case and the companion case of *Bustillo* v. *Johnson*, No. 05-51, raise questions of whether the Vienna Convention on Consular Relations creates rights enforceable in state criminal prosecutions and whether the Optional Protocol to that convention obligates state courts to follow the decision of the International Court of Justice in *Case Concerning Avena and other Mexican Nationals* (*Mex.* v. *U. S.*), 2004 I. C. J. No. 128 (Judgment of Mar. 31), (cited below as "*Avena*"). *Amicus* CJLF believes that these points will be fully presented in other briefs in these cases and therefore will not argue them here. See Supreme Court Rule 37.1.

This brief will address Question 2 in the *Sanchez-Llamas* case, whether suppression of the defendant's statement, despite its voluntary nature and compliance with the *Miranda* rule,[2] is required by *Avena*.

Admission of his statements is the only prejudice petitioner claimed in his petition for certiorari, and retrial without them is the only remedy he asked. See Pet. for Cert. 25-27. If the violation petitioner claims would not entitle him to the remedy he seeks, it may not be necessary to answer the first question; the Court may take them in either order. See *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984).

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2. *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Although petitioner disputes that the obtaining of the statement complied with federal constitutional requirements, this issue was resolved against him in the state trial and intermediate appellate courts, and both the Oregon Supreme Court and this Court denied discretionary review. See *supra*, at 2. For the purpose of this brief, therefore, *amicus* will treat *Miranda* compliance as given.

I. Petitioner's statements were not the "fruit" of a Vienna Convention violation.

The *Avena* decision is best known for the holding of the International Court of Justice (ICJ) that the procedural default rule cannot bar a Vienna Convention claim when the default occurred before the consulate had knowledge of the case. See *Avena*, ¶ 113;[3] cf. *Breard* v. *Greene*, 523 U. S. 371, 376 (1998) (*per curiam*). However, the ICJ rejected many of Mexico's claims regarding the nature of the Vienna Convention notification requirement and the consequences of noncompliance.

Most importantly, the court rejected the claim that "partial or total annulment of conviction or sentence provides the necessary and sole remedy" for a violation of the treaty. *Avena*, *supra*, ¶ 123. Instead, a causal connection must be shown that "the violations . . . ultimately led to convictions and severe penalties . . . ." *Id.*, ¶ 122. In other words, the burden is on the petitioner to show "actual prejudice." *Id.*, ¶ 121. In this aspect, *Avena* is entirely consistent with *Breard*'s alternative holding, that even if a Vienna Convention claim is properly raised and a violation proved, relief from the criminal judgment requires "a showing that the violation had an effect on the trial." *Breard*, 523 U. S., at 377.

The *Avena* decision rejected Mexico's claim that in any retrial after the finding of a violation, any statement or confession obtained prior to notification to the arrestee of his consular rights must be suppressed. Instead, the confession issue is to be considered in each case as a part of the review process. *Avena*, *supra*, ¶¶ 126-127. That means a causal connection between the violation and obtaining the confession. In American exclusionary rule parlance, the confession must be the

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3. *Avena* did not hold that the procedural default rule cannot apply to defaults occurring after the consulate has been notified or otherwise gained knowledge of the case. The present case does not involve a default, and *Bustillo* involves a prenotification default. See Brief for Petitioner in *Bustillo* v. *Johnson*, No. 05-51, pp. 8-9.

"fruit of the poisonous tree." See, *e.g.*, *United States* v. *Patane*, 542 U. S. 630, 635 (2004) (plurality opinion).

Obviously, there is no causal connection when the statement or confession precedes the violation. Article 36, paragraph 1(b), requires that the arrestee be informed of his rights "without delay," and if he requests notification, the consulate must be notified "without delay." See *Avena*, *supra*, ¶ 50. The ICJ rejected the claim that notice to the arrestee necessarily precede interrogation. *Id.*, ¶ 85. During preparation of the Convention, suggested time periods for notification ranged from a minimum of 48 hours up to one month, and the ICJ rejected the argument that the adopted term "without delay" meant " 'immediately' upon arrest." *Id.*, ¶¶ 86-87. Without further explanation, though, the ICJ nonetheless found a duty to inform the arrested person as soon as he is known to be a foreign national or there are grounds to think he probably is. *Id.*, ¶ 88. The ICJ goes on to find a violation in the case of an arrestee whose birthplace was stated in the arrest report and who was informed 40 hours later. *Id.*, ¶ 89.

Whether the duty to inform is overdue eight hours after learning of the arrestee's nationality, when petitioner says the questioning was concluded in the present case, is not squarely resolved by this confusing and self-contradictory passage. Even assuming that information was overdue, however, there is no comparable requirement of immediacy regarding actually notifying the consulate.

> "Mr. Hernández (case No. 34) was arrested in Texas on Wednesday 15 October 1997. The United States authorities had no reason to believe he might have American citizenship. The consular post was notified the following Monday, that is five days (corresponding to only three working days) thereafter. The Court finds that, in the circumstances, the United States did notify the consular post without delay, in accordance with its obligation under Article 36, paragraph 1 (b)." See *Avena*, *supra*, ¶ 97.

Unlike the *Miranda* rule, the Vienna Convention notification provisions were not drafted with interrogation in mind. "[D]uring the Conference debates on this term, no delegate made *any connection* with the issue of interrogation." *Avena*, *supra*, ¶ 87 (emphasis added); cf. *Miranda* v. *Arizona*, 384 U. S. 436, 445 (1966) (deciding admissibility of statements obtained during custodial interrogation). Unlike a request for counsel under *Miranda*, there is no requirement under *Avena* to refrain from interrogation until a request for consular notification has been fulfilled. *Avena*, *supra*, ¶ 87; cf. *Miranda*, *supra*, at 473-474. Also unlike *Miranda*, there is no waiver to be made as a condition for interrogation. Cf. *Miranda*, *supra*, at 479.

Because consular notification is a matter of timing unrelated to the taking of the statement, it is more like the prompt appearance requirement than the *Miranda* requirement. *United States* v. *Mitchell*, 322 U. S. 65, 69-70 (1944) held that a statement made promptly upon arrest was not rendered inadmissible under *McNabb* v. *United States*, 318 U. S. 332 (1943) by a subsequent violation of the prompt appearance rule. Similarly, if consular notification is not overdue when a statement is taken, the fact that the notification is not made when it later becomes due has no causal connection to the making of the statement, and the subsequent violation is no ground for suppression.

Given a proper administration of *Miranda* warnings, a knowing and voluntary waiver of the right to have counsel during interrogation, and interrogation taking place promptly after arrest, there will rarely, *if ever* be a causal connection between failure to give the consular information before interrogation and obtaining the statement. Indeed, if the statement and the information of nationality are obtained in the same interview, or if nationality is learned later, there is no violation at all.

In the present case, Sanchez-Llamas made his statements within a few hours of arrest. The Consul General says the

consulate will advise every arrestee to remain silent if the *consulate* is notified prior to interrogation, see App. to Pet. for Cert. 28, but such swift notification of the consulate (as opposed to the arrestee) is not required by *Avena*. Even if failure to inform petitioner himself was a violation, a causal connection between that violation and the statements is every bit as speculative as the one rejected in *Breard*. Cf. 523 U. S., at 377.

Petitioner asserts that he was unable to understand the *Miranda* warnings, because the concept of rights in the warnings is unknown where he comes from, a place where he greatly feared the police. Brief for Petitioner 6. Informing the petitioner that he had the right to notify the very government that he had learned not to expect *any* protection from was not likely to change his decision on how to deal with the police in this case.

No causal connection has been shown between the Vienna Convention violation in this case and the outcome. Hence, there is no showing of "prejudice" within the meaning of *Avena*.

II. Suppression of evidence is a disfavored remedy and should not be expanded without exceptionally compelling justification.

Petitioner makes the sweeping claim that evidence must be suppressed whenever it is obtained in violation of any "law that creates or safeguards individual rights." Brief for Petitioner 35 (capitalization omitted). In reality, as we will show, the exclusion sanction is much narrower than that, and this Court has made it progressively narrower over the last three decades. *Amici* National Association of Criminal Defense Lawyers and Law Counsel of Australia (NACDL/LCA) are even more expansive, calling suppression of evidence a "time-honored remedy." NACDL/LCA Brief 5. This assertion requires a very selective view of time. It has a Rip Van Winkle quality about

it, as if *amici* slept through the entire Burger and Rehnquist Court eras. During that period, exclusionary rules have been anything but "honored." They have been recognized as unjust and unjustified, and they have been limited by this Court, by Congress, and by the States.

The requirement of the Fourth Amendment that warrants issue only on probable cause is certainly a law that safeguards individual rights, yet evidence obtained in violation of this requirement is not suppressed if police relied on the warrant in good faith. See *United States* v. *Leon*, 468 U. S. 897, 920-922 (1984). The same is true if the officer relied on a statute later held unconstitutional. See *Illinois* v. *Krull*, 480 U. S. 340, 349-350 (1987). In *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 363-365, and n. 4 (1998), the Court reviewed these and other instances where it had narrowed or refused to broaden the exclusionary rule, sanctioning the use of unconstitutionally obtained evidence in grand jury proceedings, in tax cases, in deportation proceedings, when a third person's rights are asserted, and for impeachment. *Scott* itself held that such evidence was admissible in parole revocation hearings. See *id.*, at 364.

Finding the truth is the essential purpose of a trial, see *United States* v. *Havens*, 446 U. S. 620, 626 (1980), and rules which exclude evidence without regard to its reliability are contrary to that purpose. See *Stone* v. *Powell*, 428 U. S. 465, 490 (1976). *Mapp* v. *Ohio*, 367 U. S. 643 (1961) may be too deeply ingrained at this point to overrule. Repeated calls to replace it with a civil remedy, see, *e.g.*, *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 424 (1971) (Burger, C. J., dissenting); Slobogin, Why Liberals Should Chuck the Exclusionary Rule, 1999 U. Ill. L. Rev. 363, go unheeded by Congress, probably because Congress cannot risk creating an expensive alternative without an assurance it will be accepted as such. Though we are stuck with *Mapp*, this Court should, and for three decades largely has, "decline[d] to go beyond it,

even by a fraction of an inch." Cf. *Silverman* v. *United States*, 365 U. S. 505, 512 (1961).

The other massive but dubious exclusionary rule is, of course, *Miranda* v. *Arizona*, 384 U. S. 436 (1966).[4] *Miranda* similarly hangs on by its *stare decisis* fingernails, retained because it has "became imbedded" rather than because of its reasoning. See *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000). As with *Mapp*, many decisions have been necessary to limit the damage. See *Harris* v. *New York*, 401 U. S. 222, 226 (1971) (use for impeachment); *New York* v. *Quarles*, 467 U. S. 649, 657 (1984) (public safety exception); *Oregon* v. *Elstad*, 470 U. S. 298, 309 (1985) (second statement as "fruit"); *United States* v. *Patane*, 542 U. S. 630, 644 (2004) (plurality opinion) (physical evidence as "fruit"); *id.*, at 644-645 (Kennedy, J., concurring in the judgment) (same).

Legislative bodies as well have shown less willingness over the years to create or expand exclusionary rules and more willingness to cut back on them. As far back as 1968, Congress showed deep ambivalence in the Omnibus Crime Control and Safe Streets Act. The Act included Congress's ill-fated attempt to overrule *Miranda*. See *Dickerson*, 530 U. S., at 435-436. In the same act, Congress *did* abrogate, or at least substantially limit, the nonconstitutional *McNabb-Mallory* rule.[5] See 2 W. LaFave, J. Israel, & N. King, Criminal Procedure § 6.3(b), pp. 472-474 (2d ed. 1999). Petitioner curiously relies on a rule repudiated by Congress 38 years ago as his example of a long-standing requirement of suppression for nonconstitutional rules. Brief for Petitioner 37-38; accord NACDL/LCA Brief 6-7. Although the three views of 18

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4. The indubitable exclusionary rule, in contrast, is *Brown* v. *Mississippi*, 297 U. S. 278 (1936). A confession which was actually coerced is bad evidence, and its exclusion furthers rather than hinders the search for truth.

5. *McNabb* v. *United States*, 318 U. S. 332 (1943); *Mallory* v. *United States*, 354 U. S. 449 (1957).

U. S. C. § 3501(c) described by LaFave, *et al.*, dispute how much of the rule Congress actually abrogated, there is no doubt that some violations of the rule in question are no longer remedied by exclusion.

In Title III of the 1968 Act, Congress did create an exclusionary rule for electronic surveillance. See 18 U. S. C. § 2515. However, by 1986 Congress had decided to go no further. Congress amended the Act to cover a broad range of electronic communications but precluded exclusion as a sanction. See 2 W. LaFave, *et al.*, *supra*, § 4.6(a), at 388; 18 U. S. C. § 2518(10)(c). LaFave finds this a "curious distinction" from prior law, but the reason for it is not difficult to see. While there is not yet sufficient political momentum to repeal the existing Title III exclusionary rule, Congress could and did agree not to expand it any further.

In 1982, the people of America's largest state emphatically rejected exclusionary rules by direct vote. Article I, § 28(d), of the California Constitution created a right of the people to truth in evidence, abrogating the judicially created state-law exclusionary rules existing at that time. See *In re Lance W.*, 37 Cal. 3d 873, 879, 694 P. 2d 744, 747 (1985). The same initiative added § 29, providing that the people, as well as the defendant, have a right to due process of law. Cf. *Stein* v. *New York*, 346 U. S. 156, 197 (1953) (Jackson, J.), overruled on other grounds, *Jackson* v. *Denno*, 378 U. S. 368, 391 (1964). It is a sad commentary on American jurisprudence that such a declaration is necessary, but it is. When valid, probative evidence favorable to defense is suppressed, that is a denial of due process of law, see *Chambers* v. *Mississippi*, 410 U. S. 284, 302-303 (1973), yet petitioner asks this Court to do exactly that to the people of Oregon.

Nothing in the Vienna Convention, as construed by the *Avena* decision, requires this drastic sanction. See Part I, *supra*. In the absence of a requirement imposed by a federal treaty or statute or by the Constitution itself, this Court simply has no authority to direct a state court to exclude evidence. See

Dickerson, 530 U. S., at 438-439. Far from being a universal or time-honored remedy, exclusion is a discredited relic of a bygone era. It should not be extended to a new area, particularly when this Court's authority to do so is doubtful.

III. The international cases do not support a mandatory rule of suppression as a remedy for a consular notification violation.

Amici National Association of Criminal Defense Lawyers and Law Council of Australia (NACDL/LCA) cite several cases from Australia and the United Kingdom that they say support a suppression remedy in this case. See NACDL/LCA Brief 16-23. Before discussing these cases, it is important to note a distinction between this use of international cases and other controversial uses.

In *Roper* v. *Simmons*, 543 U. S. 551, 125 S. Ct. 1183, 1198-1200, 161 L. Ed. 2d 1, 25-27 (2005), the Court looked to contemporary international sources in deciding whether execution of persons for crimes committed while under the age of 18 violated the Eighth Amendment to the Constitution of the United States. This usage was controversial, to put it mildly. See *id.*, at 125 S. Ct., at 1225-1229, 161 L. Ed. 2d, at 60-64 (Scalia, J., dissenting); Posner, The Supreme Court—Foreword: A Political Court, 119 Harv. L. Rev. 32, 84-85 (2005).

Use of international law in construing a treaty is quite different. See Posner, *supra*, at 85. A treaty is a contract among nations. Interpretations of its terms by courts of other parties to the treaty are unquestionably relevant and worth examining. See *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. 155, 175-176 (1999).

One hundred and sixty-eight countries are parties to the Vienna Convention on Consular Relations. Brief for Petitioner 2. If the courts of over 100 of those countries, or even a heavy majority of the major developed countries with mature legal

systems, had interpreted the treaty to categorically forbid the introduction of a statement into evidence when the consular information and notification provisions had not been complied with, that would be a weighty argument that exclusion is a treaty obligation of the United States. *Amicus* CJLF has not found such a consensus, and neither petitioner nor his supporting *amici* have demonstrated one.

The Government of the United Mexican States has filed an *amicus* brief in support of petitioner. Six pages of that brief are devoted to the argument that suppression of evidence should be granted as a remedy. See Brief for Government of the United Mexican States as *Amicus Curiae* 24-30. What is most remarkable about this argument is not what it says, but what it does not say. There is no citation to a case where a court of Mexico has suppressed a statement as a remedy for a Vienna Convention violation. There is no statement by the government of Mexico that it has provided such a remedy in the past and no commitment that it will provide such a remedy in the future. Unless Mexico has achieved 100% compliance with Vienna Convention requirements among its police force, which is exceedingly unlikely, there are violations, and one would expect to see Mexico's suppression remedy cited in this brief if it existed. The brief submitted by the European Union similarly does not cite a single case in which any of its member nations has suppressed a statement on this ground. Of all the briefs submitted in support of the petitioner, only the NACDL/LCA brief makes any attempt to show that *any* other countries have suppressed evidence in cases such as this, but even the few cases they cite fall far short of the mark.

The Australian cases must be considered in light of the Crimes Act of 1914,[6] which provides by statute for many of the same rights which this Court has provided by case law. Sections 23F and 23G provide for warnings, counsel, and a

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6. The Crimes Act is available on the Australian government Web site at http://scaleplus.law.gov.au/html/pasteact/browse/TOCCR.htm.

qualified right to remain silent along the general lines of the *Miranda* v. *Arizona*, 384 U. S. 436 (1966) line of cases. In addition, section 23P(1) codifies the Vienna Convention requirements of information of rights and notification of the consulate on request. Most importantly, section 23P(2) creates a statutory requirement that *Avena* held is *not* required by the Vienna Convention. If the arrestee wishes to contact the consulate, the police must refrain from interrogation until he has had a reasonable opportunity to do so. Cf. *Case Concerning Avena and other Mexican Nationals* (*Mex.* v. *U. S.*), 2004 I. C. J. No. 128, ¶ 87 (Judgment of Mar. 31) (no such requirement).

Amici NACDL and LCA cite three state and territorial cases in which, they say, "Australian courts have applied suppression or exclusion as the remedy for breaches of, inter alia, consular communication rights." NACDL/LCA Brief at 19 (citing *Regina* v. *Tan*, [2001] W.A.S.C. 275 (W. Austl. Sup. Ct.)); *Regina* v. *Su*, [1997] 1 V.R. 1 (Sup. Ct. Vic.); *Tan Seng Kiah* v. *Regina*, [2000] 10 N.T.L.R. 128 (N. Terr. Ct. Crim. App.). *Amicus* CJLF claims no expertise in Australian law, but we can safely presume that an LCA brief in support of the petitioner will cite the strongest authority available from that country for a suppression remedy for Vienna Convention violations. Upon closer examination, these cases provide very little support.

The earliest of the cases, *Regina* v. *Su*, *supra*, was a drug smuggling case. The case is complex, so some detail is required to understand its implications, or lack of them, for the present case.[7] "The six accused comprised three Japanese brothers Yoshio, Masahru and Mitsuo Katsuno, two other Japanese nationals Asami and Honda, and a Malaysian, Su." *Su*, *supra*, at 1. The interrogation questions involved Yoshio Katsuno. The holdings are summarized in headnotes (11) to

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7. *Amici* NACDL/LCA simply cite this long, complex case in its entirety, without a point page.

(14). See *id.*, at 4. The convictions of the other five were affirmed. See *ibid.*, headnote (15).

Yoshio was interviewed four times, and the records of three of the interviews were introduced as evidence. He was interviewed by an immigration official upon arrival at Melbourne Airport, by police Detective Obers shortly thereafter, by the detective again several hours later, and by the detective a third time three days later at police headquarters. See *id.*, at 44. The court found he was not under arrest at the time of the immigration interview, so no warnings were required. See *id.*, at 49.

The court found Yoshio was under arrest at the time of Obers' first interview, and therefore the *Miranda*-type warnings were required by sections 23F and 23G. The trial judge's finding that the statements were voluntary was upheld on a deferential standard, but that was not the end of the matter. The court had to consider exclusion on grounds of unfairness or public policy. See *id.*, at 53-54. The detective attempted to give the 23F advisement of the right not to say anything and that a statement may be used in evidence, but the translator failed to effectively communicate the second part to Yoshio. See *id.*, at 46, 54. The detective completely failed to comply with the 23G requirement of advice regarding contact with friend, relative, or lawyer. See *id.*, at 54. The court then proceeded to consider whether these deficiencies required exclusion in the circumstances of the case (which is not required for every violation), and the court ultimately concluded they did. See *id.*, at 54-55.

Conspicuous by its absence from this entire discussion is *any* mention of section 23P or the Vienna Convention. On the path to deciding that the *Miranda*-type violations render admission unfair, the court mentions the fact that the arrestee was a foreigner, unfamiliar with Australian police procedures, see *id.*, at 55, but consular notification is nowhere mentioned.

The second interview presented a *Mallory*[8]-type question. The police had not taken Yoshio before a magistrate within the time required by section 23C of the Crimes Act. See *id.*, at 55. In addition, they had not correctly documented their compliance with the public safety exception allowing them to delay access to counsel. See *id.*, at 56-58. The important fact for this case, though, was that they *did* comply with section 23P, and therefore with the Vienna Convention. "Before the police began this interview they permitted Yoshio to see a Japanese consular official. *Thus no question of any contravention of s. 23P of the Crimes Act arises.*" *Id.*, at 56 (emphasis added). The same is obviously true of the last interview, and consular notification is not mentioned. See *id.*, at 58-59.

Regina v. *Su* is a fascinating read in comparative criminal procedure, but it provides no support whatever for the petitioner's position in the present case. The interviews in question were suppressed on grounds analogous to well-established rules of American law, *Miranda* and *Mallory*. No violation of section 23P or the Vienna Convention was found by the court, and no evidence was suppressed on that ground.

Regina v. *Tan*, [2001] W.A.S.C. 275 has some relevance, but very slight. The judge found that the police had violated five different sections of the Crimes Act. See *id.*, ¶ 56. They included sections 23F, 23G, and 23P discussed above, section 23N regarding interpreters for persons with limited English skills, and section 23V which makes tape recording mandatory when practical. Unlike the other sections, section 23V expressly makes noncompliance a ground for exclusion. See *Regina* v. *Su*, *supra*, at 54.

The judge in *Tan* does not discuss consular notification other than the passing mention of section 23P in paragraph 56. He simply holds that this conglomerate violation of nearly every rule in the book justifies exclusion. He relies primarily

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8. *Mallory* v. *United States*, 354 U. S. 449 (1957).

on *Su*, which is not a consular notification case. See *Tan*, ¶¶ 58-59. There can be little doubt from reading this decision that the 23P violation was not necessary to the outcome. If the arrestee had not been a foreigner, so that section 23P did not apply, the evidence would still have been excluded on these facts. *Tan* is much too slender a reed to support the proposition that Australian courts would exclude a statement for violation of section 23P *alone*, which would be more closely analogous to the question in this case.

Tan Seng Kiah v. *Regina*, [2001] 10 N.T.L.R. 128 contains language pertinent to the present case, quoted in the NACDL/LCA Brief, at 19-20, but again we see that the circumstances are quite different. Difficulty obtaining a Mandarin interpreter caused the police to exceed the section 23C time limit, which the trial judge found excusable but the appellate court did not. See *id.*, ¶ 32. The arrestee was informed of both his right to counsel and his right to consular notification, and he invoked both, but neither was provided before interrogation. See *id.*, ¶¶ 22-23. The compound effect of these three violations were then weighed in a discretionary decision and found to outweigh the seriousness of the offense (drug smuggling), and the evidence was excluded. See *id.*, ¶¶ 67-68,72.

The first distinction to note in *Tan Seng Kiah* is that there was no violation of the Vienna Convention in this case. The arrestee was informed of his right to consular notification on the day of arrest, a Saturday, and he invoked it. See *id.*, ¶ 22. The failure of the police to actually notify the consulate prior to a series of interrogations concluding the following Monday is not a violation according to the *Avena* decision. See *supra*, at 6; *Avena*, *supra*, ¶¶ 87, 97 (no requirement of notification before interrogation; five days/three working days is sufficiently prompt notification). The case is about an additional requirement of notification before interrogation that the Australian Parliament has chosen to impose, not a requirement that follows from Australia's accession to the Convention.

Neither Congress nor the Oregon Legislature has chosen to impose such a requirement on the Oregon police.

The other distinction, as in *Su* and *Tan*, is that the statement was not excluded on the basis of the 23P violation alone. Rather, it was excluded on a combined basis with other violations that by themselves would have been sufficient to exclude it in the United States.[9]

Amici NACDL and LCA state that "courts in the United Kingdom have concluded that failure to inform detained foreigners of their consular rights warranted the discretionary remedy of exclusion." NACDL/LCA Brief 21. Yet they cannot cite a single decision in an official or quasi-official case reporter to support that proposition. The best they can find is two case notes in a bulletin of an advocacy group, describing two trial court decisions apparently by the same judge. See *id.*, at 21-22. They cite *Regina* v. *Bassil and Mouffareg* (Acton Crown Court, 1990), noted in Legal Action 23 (Dec. 1990), and *Regina* v. *Van Axel and Wezer* (Snaresbrook Crown Court, 1991), noted in Legal Action 12 (Sept. 1991).

It goes without saying that the opinion of a single trial court judge is not a reliable indication of the jurisprudence of a nation. See, *e.g.*, *Newdow* v. *Congress of the United States*, 383 F. Supp. 2d 1229 (ED Cal. 2005), appeal pending, No. 05-17344 (CA9) (Pledge of Allegiance unconstitutional). Even accepting these case notes at face value for the sake of argument, however, they do not indicate that an exclusionary remedy is a national obligation of signatories to the Vienna Convention. Indeed, they do not even mention the Vienna Convention. They are based on national law, which the British

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9. *Foo* v. *The Queen*, [2001] N.T.C.C.A. 2 (N. Terr. Ct. Crim. App.), cited by *amici* with a "see also" signal, found no violation on the facts of the case. See *id.*, ¶ 44. The opinion therefore says nothing about whether the evidence would have been suppressed if a violation had been established.

Parliament, like the Australian Parliament, may have enacted for reasons other than a treaty obligation to do so.

For the position of the United Kingdom on the exclusion of evidence as a remedy for a treaty violation, it may be enlightening to look to the House of Lords, even if we cannot find a decision specifically on the Vienna Convention. In *Regina* v. *Khan*, [1996] 3 All E. R. 289, the defendant sought to suppress a tape recording obtained through a covert listening device on the grounds, among others, that the taping violated Article 8 of the European Convention on Human Rights. The principal opinion by Lord Nolan relies on a decision of the European Court of Human Rights rejecting the proposition that the Convention requires exclusion of evidence obtained in violation of it. *Id.*, at 300-301 (citing *Schenk* v. *Switzerland*, 13 E.H.R.R. 242 (1988)). Lord Nolan concludes "that the [trial] judge was fully entitled to hold that the circumstances in which the relevant evidence was obtained, even if they constituted a breach of art 8, were not such as to require the exclusion of the evidence." *Id.*, at 302.[10]

With a world of decisions to choose from, all that *amici* NACDL/LCA have produced is a handful of decisions in which a mix of policy choices applied to a mix of violations has produced a decision to suppress a statement. Not a word in any of these sources says or implies that the Vienna Convention itself required the suppression. If and when Congress enacts implementing legislation, as the Australian and British Parliaments have done, then it will be proper for this Court to decide whether that legislation requires a suppression remedy. Until then, the only question within this Court's jurisdiction is

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10. The British attitude toward the exclusionary rule generally is evident in the next paragraph. "It would be a strange reflection on our law if a man who has admitted his participation in the illegal importation of a large quantity of heroin should have his conviction set aside on the grounds that his privacy has been invaded." *Ibid.*

whether the treaty itself does, and nothing in the cases cited supports an affirmative answer.

The question before this Court is not whether suppression of petitioner's statement would have a salutory effect on the United States' reputation among the international legal community. The question this Court has jurisdiction to decide is whether suppression is *required* by a duly ratified treaty. See 28 U. S. C. § 1257(a). *Avena* does not so hold, and neither does any decision by any court in any country cited by petitioner or supporting *amici*. There is no legal basis for requiring the courts of Oregon to suppress evidence and thereby blind themselves to the facts of this case.

CONCLUSION

The decision of the Supreme Court of Oregon should be affirmed.

January, 2006

Respectfully submitted,

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DEC 2 1 2005

NOS. 04-10566 AND 05-51

In The Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner

v.

OREGON

Respondent.

MARIO A. BUSTILLO,

Petitioner

v.

GENE M. JOHNSON, DIRECTOR OF VIRGINIA DEPARTMENT OF CORRECTIONS

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF OREGON AND THE SUPREME COURT OF VIRGINIA

BRIEF OF AMICI CURIAE THE EUROPEAN UNION AND MEMBERS OF THE INTERNATIONAL COMMUNITY IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The European Union (EU) considers the respect for treaty based rights to be of vital importance both nationally and within the international community. This principle is common to its twenty-five Member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Like the United States, all EU Member States are party to the Vienna Convention on Consular Relations (VCCR).[2] Article 36 of the VCCR (Article 36) confers both individual and State rights. As such, the EU has an interest in securing compliance with rights guaranteed under Article 36. This position has been expressed to the Government of the United States through specific demarches in cases involving individual foreign nationals who have been deprived of their rights under Article 36.[3]

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[1] In accordance with Supreme Court Rule 37.6, *amici* represent that no party other than *amici* and counsel for *amici* authored this brief in whole or in part, and no person or entity, other than *amici* and counsel, have made a monetary contribution to the preparation or submission of this brief. Global consent letters from all parties for all *amicus curiae* briefs are on file with the Clerk of the Court. Counsel acknowledge the valuable coordination and research for this project from Anne James, Executive Director and Joanne Cecil, Project Assistant, International Justice Project.

[2] *Opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[3] Demarches in the cases of foreign nationals were transmitted in each of the following: Javier Suarez Medina, Texas (Mexican), 23 July, 2002; Hung Thanh Le, Oklahoma (Vietnamese), 4 December, 2003; Gerardo Valdez, Oklahoma (Mexican), 13 July, 2001; Osvaldo Torres, Oklahoma (Mexican) 30 April, 2004. All these communications can be found on the Internet, *EU Policy and Action on the Death Penalty, at* http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActionnonUSDeathRowCases. See, also European Union, *Guidelines to EU Policy Towards Third Countries on the Death Penalty* (June 3, 1998), Part III(v) *at* http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm.

As nations committed to the rule of law, the Member States of the EU have a fundamental interest in compliance with international instruments, particularly when the rights of a Member State's national may be in the balance.

The EU believes that it can provide this Court with a special and unique perspective that is not available through the views of the parties.

Liechtenstein, Norway and Switzerland have explicitly expressed to the European Union and its Member States their shared interest as *amici* and their support for the arguments put forward in the present brief.

The positions taken in the following arguments, while expressed as those of the European Union, are shared by all signatories to the brief.

SUMMARY OF ARGUMENT

Article 36 confers on detained foreign nationals a right to be informed, without delay, by the arresting authority, of the right to contact consular officers of the Sending State. The right to be so informed is an individual right (as well as a right accorded to the Sending State). If the foreign national is convicted without being informed of the rights under Article 36, that individual must be allowed to apply to a court in order to challenge the conviction and sentence by claiming, in reliance on Article 36 (1), that the competent authorities failed to comply with their obligations to provide the requisite consular information.

Courts must conduct such a review even if their procedural rules, such as those relating to default of claims, would otherwise preclude review. These propositions have been

affirmed by the International Court of Justice (ICJ).[4] Furthermore, the right to consular access is a right protected under customary international law and must therefore be observed.

ARGUMENT

I. THE VIENNA CONVENTION ON CONSULAR RELATIONS IS A KEY FORM OF PROTECTION FOR FOREIGN NATIONALS

The VCCR, a product of the Conference on Consular Relations convened by the United Nations General Assembly in 1963, is a global multilateral treaty that governs consular relations and regulates many aspects of the relationship of foreign consuls to a host Government. The VCCR has been ratified by 168 States (including the United States on November 24, 1969) and is the cornerstone of international consular relations.[5] Its conclusion is regarded as "the single most important event in the history of the consular institution. Indeed, after 1963, there can be no settlement of consular disputes or regulation of consular relations, whether by treaty or national legislation, without reference or recourse to the Vienna Convention".[6]

The Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement

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[4] *LaGrand (F.R.G. v. U.S)*, 2001 I.C.J 104 (Jun. 27); *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

[5] United Nations, *Multilateral Treaties Deposited with the Secretary-General, Vienna Convention on Consular Relations, at,* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp.

[6] LUKE LEE, CONSULAR LAW AND PRACTICE at 26 (2d. ed. 1991).

of Disputes (Optional Protocol) provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice".[7]

The ICJ is "the principal judicial organ of the United Nations" (U.N.).[8] The Court's statute is annexed to the U.N. Charter; therefore, States which become members of the United Nations also become parties to the Statute.[9]

The United States[10] and Member States of the EU are party to the United Nations Charter. Respect for ICJ judgments by States that are party to litigation is a basic principle of the international legal order as articulated in the United Nations Charter, Article 94: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party".

Article 36 recognizes the rights of consuls to communicate with and assist their nationals. Article 36 also confers specific rights on detained or imprisoned foreign nationals. As the United States Government has noted before the International Court of Justice, Article 36 "establishes rights not only for the consular officer, but perhaps more importantly for the nationals of the Sending State who are

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[7] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261.

[8] U.N. Charter, *opened for signature* June 26, 1945, 59 Stat. 1031, T.S. No. 993, Article 92; Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993.

[9] U.N. Charter, Article 93, para.1.

[10] The United States ratified the U.N. Charter on August 8, 1945. United Nations, *Multilateral Treaties Deposited with the Secretary General, Charter of the United Nations, at,* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterI/treaty1.asp

assured access to consular officers and through them to others."[11]

Article 36 requires a Receiving State to inform detained foreign nationals of their right to communicate with their consulate and to facilitate access between detained foreign nationals and consuls of the Sending State. In addition, Article 36 confers specific State rights, recognizing the right of consuls to have access to, communicate with, and assist their detained national. Further, it establishes an obligation upon the Receiving State under paragraph 1 (c) of Article 36 to enable the consular officers to arrange for legal representation of their nationals.

The significance of consular access has been expounded upon by the Inter-American Court of Human Rights (IACtHR). The IACtHR stated that "notification of the right to communicate with a consular official of his country will materially improve his possibilities of a defense," and "procedural measures, including those taken by the police, will be done with greater concern for legality and greater respect for the dignity of the person."[12] The IACtHR stated that the right to be informed of the right to consular access "is a means of defense for the accused that is reflected, on occasion in a determinative way, in the respect shown for his other procedural rights".[13]

EU Member States consider consular access to be of critical importance. A foreign national faces unique disadvantages when left to navigate the foreign country's legal system in

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[11] U.S. Diplomatic and Consular Staff in Tehran (*USA v. Iran*), ICJ Pleadings, at 174.

[12] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 121, Advisory Opinion OC-16/99, Inter-American Court of Human Rights (1999).

[13] *Id.* para 123.

the absence of support from his home nation, even if he is represented by competent legal counsel. Article 36 reflects agreement among the States parties that foreign nationals require special assistance when they are detained on a criminal charge.

Participation by a consul provides greater assurance that a Sending State's national will understand the rights afforded by the law of the Receiving State, and correspondingly that the proceedings will be conducted as intended under the law of the Receiving State.

In a particular case, a consul may be able to assure that the accused is represented by a competent attorney who possesses a cultural understanding of the national's specific circumstances and background. Consuls may also be able to acquaint their nationals with the basic procedures under the local legal system.

Accurate translation may also be of importance. A consul may be able to assist in securing expert translation, the result of which could provide both an effective understanding by the national of his legal rights and the assurance for the arresting authority of a thorough and accurate comprehension of the national's statements.

A consul may assist in locating witnesses or documentary evidence available in the Sending State. The information thus gained may be critical in a determination of guilt, and, in the event of a conviction, in the assignment of an appropriate sentence.

II. ARTICLE 36 PROVIDES JUDICIALLY ENFORCEABLE RIGHTS

This Court has provisionally accepted in *Breard v. Greene*[14] that the VCCR confers on a foreign national a right to consular assistance following arrest. The ICJ in *LaGrand (F.R.G. v. U.S.)*, stated that Article 36 provides a right invocable by the foreign national. Article 36 provides, in part: "The said authorities shall inform the person concerned without delay of his rights under this subparagraph." The ICJ confirmed that Article 36 creates a right for a foreign national both because of this plain language, and "[m]oreover, under Article 36, paragraph 1 (c), the sending State's right to provide consular assistance to the detained person may not be exercised 'if he expressly opposed such action.' The clarity of these provisions, viewed in their context, admits of no doubt."[15]

III. JUDICIAL REVIEW OF CONVICTION AND SENTENCE IS REQUIRED IF ARTICLE 36 IS VIOLATED

If a foreign national is convicted absent compliance with the notification obligation of Article 36, the rights of both the Sending State and the foreign national are implicated, and the conviction must be reviewed. Article 36 provides in a second paragraph: "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full

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[14] *Breard v. Greene*, 523 U.S. 371, 376 (1998).

[15] *LaGrand (F.R.G. v U.S.)*, 2001 I.C.J. 104 (Jun. 27), para 77.

effect to be given to the purposes for which the rights accorded under this Article are intended".[16]

The ICJ has addressed required remedies, first in *LaGrand* in 2001, and more recently, on March 31, 2004, in *Avena and other Mexican Nationals*.[17] In Article 36, paragraph 2, the ICJ found an obligation to allow a foreign national to seek a remedy: "The Court cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual".[18]

The ICJ held that where the notification obligation under Article 36 has not been observed, action on the criminal conviction is required: "if the United States . . . should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention".[19]

The ICJ subsequently affirmed in *Avena* the requirement for review and reconsideration of a breach of Article 36 rights. The Court considered "that it is the judicial process that is suited to this task".[20] Contrary to the argument of the US,

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[16] VCCR, Article 36, para. 2.
[17] *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).
[18] LaGrand, para. 89.
[19] *Id.* para. 125.
[20] *Id.* para. 141.

the Court stated that consideration by way of executive clemency does not suffice in view of the fact that the clemency process, as currently practiced in the US, does not appear to meet the requirements and it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration".[21]

IV. REVIEW MUST TAKE ACCOUNT OF THE VIOLATION

Review and reconsideration is required even absent a showing that a different result would have been achieved had a consul intervened. As indicated above, a consul may act in a variety of ways in a particular case. After a person has been convicted without being informed of the right of consular access, it may be impossible to determine what impact a consul might have had on the proceedings.

Article 36, by requiring consular access, presumes that it will help a foreign national. The ICJ stated in *Avena*, "The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention".[22]

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[21] *Avena*, para. 143.

[22] *Avena* para. 122.

V. RULES ON DEFAULT MAY NOT BE APPLIED

The ICJ ruled that treaty obligations require that rights be enforced at whatever point in time it remains possible to do so, regardless of rules on procedural default. "The problem arises," the ICJ stated, "when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay,' thus preventing the person from seeking and obtaining consular assistance from the Sending State".[23] The ICJ concluded on the facts of the *LaGrand* case, "Under these circumstances, the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violated paragraph 2 of Article 36".[24]

Expanding upon this position, the ICJ in *Avena* asserted that "[t]he crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution".[25]

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[23] *LaGrand*, para. 90.
[24] *Id.* para. 91.
[25] *Avena*, para. 134.

VI. CONSULAR ACCESS IS A RIGHT UNDER CUSTOMARY INTERNATIONAL LAW

The rights of a foreign national as provided in Article 36 are part of the corpus of customary international law. Indeed, the United States accepts that consular access is required by a customary norm and it "looks to customary international law as a basis for insisting upon adherence to the right of consular notification, even in the case of countries not party to the VCCR or any relevant bilateral agreement." Consular notification is, in the view of the United States, "a universally accepted, basic obligation..."[26]

In addition to the widespread ratification of the VCCR, the customary character of the consular access right is evidenced by its inclusion in other international instruments. International norms and standards adopted by international bodies and organizations, including the United Nations, further reflect acceptance of the necessity for full respect and observance of the right to consular access.

While the VCCR is the foundational treaty that regulates consular relations, additional treaties, including a number ratified by the United States, incorporate the principle. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires States to punish those who commit torture. A torture suspect who is a foreign national "shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national". [27]

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[26] DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS, at 44 (1998).

[27] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 6 (3), G.A. Res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

Furthermore, a foreign national charged with a crime against a diplomat is entitled, by virtue of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, to consular access.[28]

Since 2000, the Organization of American States General Assembly has also enshrined these principles in the resolution on *The Human Rights Of All Migrant Workers And Their Families*.[29]

Various U.N. bodies have further confirmed this fundamental principle. The U.N. General Assembly has affirmed the right to consular access in a number of resolutions. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that a foreign national is entitled to consular access, and to be informed of that right.[30] In addition, the Declaration on the Human Rights of Individuals Who Are

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[28] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Article 6, 28 U.S. Treaties 1977 (1973).

[29] *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1717 (XXX-O/00) (Resolution adopted at the first plenary session, held on June 5, 2000); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1775 (XXXI-O/01) (Resolution adopted at the third plenary session, held on June 5, 2001); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1898 (XXXII-O/02) (Resolution adopted at the fourth plenary session held on June 4, 2002); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1928 (XXXIII-O/03), (Resolution adopted at the fourth plenary session, held on June 10, 2003); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 2027 (XXXIV-O/04), (Resolution adopted at the fourth plenary session, held on June 8, 2004).

[30] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16, U.N. General Assembly Resolution 43/173 (1988).

Not Nationals of the Country in Which They Live views consular access as a right in the event of a detention.[31]

The U.N. General Assembly has "reaffirm[ed] emphatically the duty of States parties to the Vienna Convention on Consular Relations of 1963 to ensure full respect for and observance of the Convention, in particular with regard to the right of foreign nationals, regardless of their immigration status, to communicate with a consular official of their own State in the case of detention, and the obligation of the State in whose territory the detention occurs to inform the foreign national of that right".[32]

Both the U.N. Rules for the Protection of Juveniles Deprived of their Liberty[33] and the U.N. Standard Minimum Rules for the Treatment of Prisoners[34] provide that if a foreign national is arrested, the right of consular access must be respected.

VII. CONCLUSION

The EU considers the implementation of the right of consular access to be of utmost importance to members of the international community. Article 36, as construed by the ICJ, requires the review and reconsideration of the conviction and sentence in the present cases. When notification is omitted

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[31] Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, Article 10, U.N. General Assembly Resolution 40/144 (1985).

[32] Protection of Migrants, U.N. General Assembly Resolution, A/RES/58/190 (Mar. 22, 2004), para. 10.

[33] G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

[34] Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955, by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957).

and a criminal conviction ensues, courts must provide a remedy. As the ICJ stated in *Avena*, "the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts."[35]

In light of the international law norms articulated above, the EU, Liechtenstein, Norway and Switzerland respectfully support the position of Petitioners.

Respectfully Submitted,

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[35] *Avena*, para. 121.

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MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, Director,
Virginia Department of Corrections,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF FORMER UNITED STATES DIPLOMATS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS MARIO A. BUSTILLO AND MOISES SANCHEZ-LLAMAS

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STATEMENT OF INTEREST[1]

Amici have served as Senior State Department Officials, Ambassadors, and Legal Advisers to the U.S. Department of State, representing the government of the United States at home and abroad in both Republican and Democratic administrations.[2] *Amici* express no opinion on what the ultimate resolution of Petitioners' convictions and sentences should be. Nor do all signatories of this brief necessarily agree with the International Court of Justice's ("ICJ") interpretation of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("VCCR"), in *Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 128 (Mar. 31) ("*Avena*"). But all *Amici* do agree that this Court should abide by the ICJ's interpretation of Article 36 of the VCCR as a matter of comity and uniform treaty interpretation, rather than allowing individual state courts within the United States to adopt their own independent interpretations of the meaning of Article 36. All *Amici* further agree that this Court's failure to respect the ICJ's judgment in

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[1] In accordance with Supreme Court Rule 37.6, *Amici* state that no party, person or entity other than *Amici* and their counsel authored this Brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this Brief. All parties have granted consent to the filing of this *Amicus Curiae* Brief.

[2] *Amici* include former Secretary of State Madeleine K. Albright, former Deputy Secretary of State Strobe Talbott, former Under Secretary of State Thomas R. Pickering, former Ambassadors Morton Abramowitz, Stephen W. Bosworth, Jeffrey Davidow, Wendy R. Sherman, Nancy Soderberg, and Frank G. Wisner, former Legal Adviser Herbert J. Hansell, and Special Presidential Envoy James C. O'Brien. Of their number, four have retired with the rank of Career Ambassador, the highest rank that can be awarded to members of the United States Foreign Service. *Amici* appear in their personal capacities, and by doing so, do not intend to convey the views of their affiliated institutions on the questions presented here. The qualifications of *Amici* are listed in the Appendix to this Brief.

Avena with respect to the two cases currently before the Court would significantly impair the credibility and efficacy of American diplomats in the international arena, jeopardize important U.S. foreign policy interests, and diminish American standing in the world community. *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 385 (2000) ("[O]pinions of senior National Government officials are competent and direct evidence of the frustration of congressional objectives by [a] state Act.").

Amici believe that "[g]reat nations, like great men [and women], should keep their word." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). This Court therefore should enforce *Avena*'s holdings that: (1) Article 36 of the VCCR provides foreign nationals with judicially enforceable individual rights; and (2) U.S. state and federal courts must afford those individual rights "full effect," notwithstanding the existence of any state procedural bar. To protect the foreign policy interests of the United States, this Court's judgment should ensure that state court rulings do not undermine our diplomatic relations with close allies or damage critical U.S. interests embodied in other treaty regimes.

SUMMARY OF ARGUMENT

From the founding until today, the ability of U.S. diplomats to carry out important foreign policy objectives has critically depended upon strong enforcement of our treaty obligations by the federal government and federal courts. The Framers' difficult experiences under the Articles of Confederation taught them that the United States cannot credibly conduct its foreign relations unless the several States honor national treaty obligations. Under the Articles of Confederation, state violations of national treaty obligations led important allies and adversaries to refuse both to honor their reciprocal treaty obligations and to enter new commercial treaties with the United States.

In drafting the Constitution, the Framers made sure that the federal government would have the authority to bind the entire nation, including the individual States, to our international obligations. Since its inception, this Court repeatedly has reaffirmed that understanding, regularly holding that treaties duly entered by the national government supersede conflicting state laws and bind the States to our national commitments.

The ICJ has interpreted the VCCR as creating judicially enforceable individual rights to consular access and notification, which must be given "full effect" over any state procedural bar. The President has issued an order confirming that the United States has an obligation to comply with its international commitments and to enforce the ICJ's decision in *Avena*. Notwithstanding this clear interpretation of the scope of Article 36 of the VCCR, the Commonwealth of Virginia and the State of Oregon arrested, tried, convicted, and sentenced Petitioners Mario A. Bustillo and Moises Sanchez-Llamas – Honduran and Mexican nationals, respectively – without ever informing either of his right to seek consular assistance.

Oregon's and Virginia's continuing noncompliance in these cases with the VCCR – as construed by the *Avena* court – offends the Framers' constitutional vision and promotes precisely the sort of diplomatic failures that prompted the modern treaty power. The several States' practice of ignoring the VCCR obligations has strained bilateral and multilateral relations, disrupted important national foreign policy interests, and impaired the ability of diplomats to carry out critical initiatives with foreign governments and international organizations.[3] Moreover, state noncompliance with our treaty obligations has caused allies and adversaries alike to criticize the United

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[3] *Accord Medellin v. Dretke*, 125 S. Ct. 2088, 2096 (2005) ("In this country, the individual States' (often confessed) noncompliance with the treaty has been a vexing problem. . . . [that] may have considerable ramifications . . . .") (O'Connor, J., dissenting) (citations omitted).

States and to question our longstanding leadership in international law and human rights.

This Court's decision will affect not just the ability of the United States to enforce the VCCR, but, more broadly, our nation's capacity to participate effectively in a diverse array of treaty regimes in which our executive and legislative branches of government have chosen compulsory international adjudication as a means to protect our national interests. As American diplomats, *Amici* have helped to pursue and secure numerous treaties that confer jurisdiction upon the ICJ and other international dispute-settlement bodies. As American private commercial interests become increasingly global, reliable mechanisms for international dispute resolution will become increasingly central to our nation's foreign policy. The United States cannot build or benefit from these mechanisms so long as States and localities continue to flout international tribunal rulings, break ratified treaties, and jeopardize our global reputation as a dependable treaty partner.

ARGUMENT

I. State Courts Disrupt the Diplomatic Interests of the United States When They Ignore the ICJ's Specific Holdings Construing Article 36 of the VCCR.

Article 36 of the VCCR requires all signatory nations, including the United States, to inform "without delay" any detained foreign national of his right to request assistance from the consul of his own nation and, if the national so requests, to inform "without delay" the consular office of that national's detention or arrest. Since 2001, the United States has been a party before the ICJ to three cases interpreting the scope of Article 36 of the VCCR.

First, in *Vienna Convention on Consular Relations* (*Para. v. U.S.*), 1998 I.C.J. 248 (Provisional Measures Order of Apr. 9), the ICJ indicated provisional measures questioning Virginia's violations of a Paraguayan national's

Article 36 rights. Considering that ICJ ruling in *Breard v. Greene*, 523 U.S. 371, 375 (1998), this Court found absent from the ICJ's ruling any "clear and express statement" of the meaning of Article 36 with respect to the issues currently before this Court.

Three years later, however, in *LaGrand Case* (*F.R.G. v. U.S.*), 2001 I.C.J. 466 (June 27) ("*LaGrand*"), the ICJ rejected the U.S. position that rights stemming from violations of the VCCR are solely the "rights of States, and not of individuals." *Id.* ¶ 76. The ICJ specifically held that Article 36 of the VCCR "creates individual rights." *Id.* ¶ 77. Moreover, the ICJ determined that application of procedural default rules in that case violated the VCCR because it prevented "'full effect [from being] given to the purposes for which the rights accorded under this article are intended.'" *Id.* ¶ 91 (quoting VCCR art. 36(2), 21 U.S.T. at 101) (alteration in original).

In 2004, in *Avena*, the ICJ held that the United States had violated the consular rights of numerous Mexican nationals in contravention of Article 36(1)(b) of the VCCR by failing to inform fifty-one detained Mexican nationals of their treaty rights and by failing to inform Mexican consular authorities of forty-nine of the detentions. *Id.* ¶ 153(4)-(5).[4] Citing *LaGrand*, the ICJ reaffirmed that Article 36(1)(b) of the VCCR gives detained foreign nationals judicially enforceable individual rights they can "assert[] . . . within the domestic legal system of the United States." *Id.* ¶ 40. The ICJ also held that domestic application of procedural default rules to bar consideration of VCCR claims violated Article 36(2)'s direction that signatories "enable full effect to be given to the purposes

[4] The ICJ held that the proper remedy for these violations "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals . . . by taking account . . . both of the violation of the rights set forth in Article 36 . . . and of paragraphs 138 to 141 of this Judgment." *Avena* at ¶ 153(9).

for which the rights accorded under this Article are intended." VCCR art. 36(2), 21 U.S.T. at 101; *Avena* at ¶¶ 113-14.

Together, *LaGrand* and *Avena* present clear pronouncements by the ICJ that Article 36 of the VCCR provides individual, judicially enforceable rights that cannot be impeded by local procedural bars.[5] The ICJ's unambiguous interpretation of Article 36 in *LaGrand* and *Avena* binds this Court not just as a matter of international law,[6] but also through principles of comity and uniform treaty interpretation. As this Court has explained:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). At least as much "mutual trust and respect" should be due the judgment of an international, U.N.-created tribunal that the United States has chosen as the forum for resolution of a certain category of disputes. *See* Sandra Day O'Connor, Federalism of Free Nations, *in International Law Decisions in National Courts* 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1996).

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[5] This interpretation of Article 36 is precisely the "clear and express statement" this Court had found lacking in *Breard*. 523 U.S. at 375.

[6] *See Avena* at ¶ 151 (interpretation of Article 36 of the VCCR is one of general application and is not limited to the facts of the case); *see also* 3 Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, at 1655-56 (3d ed. 1997) (ICJ judgment "creates a res judicata").

By signing the Optional Protocol to the VCCR, the United States expressly consented to the ICJ's jurisdiction to interpret the meaning of the VCCR. The United States does not deny that the decision in *Avena* was reached by an impartial judicial body[7] or that the United States fully and fairly litigated the dispute. Given this background, rules of comity should require that the ICJ's judgment be given full effect in U.S. courts without reexamining the merits of that decision. *Cf. Hilton*, 159 U.S. at 202; *see id.* at 203 ("[T]he merits of the case should not . . . be tried afresh, as on a new trial or an appeal, upon the mere assertion . . . that the judgment was erroneous in law or in fact."); *see also Medellin v. Dretke*, 125 S. Ct. 2088, 2094 (2005) (Ginsburg, J., concurring) ("It is the long-recognized general rule that, when a judgment binds or is respected as a matter of comity, a 'let's see if we agree' approach is out of order.").

This Court should adhere to the ICJ's interpretation of Article 36 of the VCCR to help ensure that the VCCR's provisions on consular access are consistently interpreted and uniformly applied by all signatories – one of the parties' principal goals in enacting the VCCR in the first place.[8] When a multilateral treaty results from an effort to achieve uniform treatment of a particular subject, "it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently." *Olympic Airways v. Husain*, 540 U.S. 644, 660

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[7] Indeed, in *Avena*, the ICJ's determination of liability was reached by a vote of 14-1 (with the U.S. judge in the majority), and its determination of remedy was reached by unanimous vote. *Avena* at ¶¶ 153(4)-(7), (9), (11).

[8] *See* Report of the U.S. Delegation to the U.N. Conference on Consular Relations, *reprinted in Vienna Convention on Consular Relations and Optional Protocol*, Sen. Exec. Rep. 91-9, 91st Cong., 1st Sess., at 3 (1969) (report of Sen. Fulbright) (stating that the U.S. entered into the VCCR to "further friendly relations between nations through the orderly development of uniform standards of consular practice").

(2004) (Scalia, J., dissenting).[9] The *Avena* court itself recognized the importance of this principle of uniform treaty interpretation, stating that it had approached the decision "from the viewpoint of the general application of the Vienna Convention" and intended its interpretation and application of the VCCR to apply in any future case between *any* parties to the VCCR. *See Avena* at ¶ 151. Both this principle of uniform treaty interpretation and the VCCR itself would be eviscerated were each national party (or local province thereof) to insist upon applying its own peculiar interpretation of the VCCR.

Recent U.S. Executive Branch positions reinforce *Amici*'s claim that principles of comity and uniform treaty interpretation warrant application of *Avena*'s interpretation of the VCCR. In his February 28, 2005 Presidential

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[9] *See also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995); *Air France v. Saks*, 470 U.S. 392, 404 (1985); *Sumitomo Shoji America v. Avagliano*, 457 U.S. 176, 185 (1982) ("When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we [as judges] must, absent extraordinarily strong contrary evidence, defer to that interpretation."); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967) ("A multilateral treaty is rather like a 'uniform law' within the United States. The Court has an obligation to keep interpretation as uniform as possible."); Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 Am. Soc'y Int'l L. Proc. 305, 305 (2004) ("When federal courts interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories. Otherwise the whole object of the treaty, which is to establish a single, agreed-upon regime governing the actions of all the signatories, will be frustrated."); A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication with U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer (Jan. 13, 2005) (transcript *available at* http://www.wcl.american.edu/secle/founders/2005/050113.cfm (last visited Dec. 18, 2005)) ("[T]he object of a treaty being to come up with a text that is the same for all the countries, [the U.S. courts] should defer to the views of other signatories, much as we defer to the views of agencies—that is to say if it's within [the] ball park, if it's a reasonable interpretation, though not necessarily the very best.") (comments of Justice Scalia).

Determination directing state courts to comply with *Avena*, President Bush declared that "the United States will discharge its international obligations under [*Avena*] by having state courts give effect to the decision *in accordance with general principles of comity*."[10] Subsequently, the Executive Branch has submitted two *amicus* briefs explaining the reasoning behind this Presidential Determination.[11] These briefs make clear that the presidential decision to adhere to *Avena* as a matter of comity was not tied to the fact that the United States was an immediate party to the *Avena* decision.[12] Instead, the United States argues, as *Amici* do here, that state compliance with *Avena* is essential for broader diplomatic reasons: because compliance "protect[s] the interests of United States citizens abroad, promotes the effective conduct of foreign

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[10] Brief for the United States as *Amicus Curiae* Supporting Respondent at app. 2, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928) (Memorandum from the President to the Attorney General (Feb. 28, 2005)), 2005 WL 504490, at *1aa (emphasis added).

[11] *See* Brief for the United States as *Amicus Curiae* Supporting Respondent, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928), 2005 WL 504490; Brief for the United States as *Amicus Curiae*, *Ex Parte Jose Ernesto Medellin*, No. AP-75,207 (Tex. Crim. App. Jun. 22, 2005), *available at* http://www.debevoise.com/publications/pdf/CCA%20US%20Amicus.pdf (last visited Dec. 18, 2005) [hereinafter U.S. CCA Brief].

[12] To the contrary, the United States claims that "[i]n particular circumstances, the President may decide that the United States will not comply with an ICJ decision and, if Security Council enforcement measures are proposed, direct a veto, consistent with the United Nations Charter." U.S. CCA Brief at 21; *see also id.* at n.3 (citing the United States' failure to abide by the ICJ's determination in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 146, (June 27)). The U.S. Government's brief gives little weight to the fact that the United States was a party to the VCCR's Optional Protocol when *Avena* was decided because "[t]he Optional Protocol does not itself commit the United States to comply with a resulting ICJ decision." *Id.* at 17. If so, it is unclear why the U.S. decision to *withdraw* from the Optional Protocol on March 7, 2005 should affect the question whether compliance with *Avena* remains necessary as a matter of comity. *Id.* at 17 n.1.

relations, and underscores the United States' commitment in the international community to the rule of law." U.S. CCA Brief, *supra* note 11, at 13; *see also id.* at 23 (explaining the President's decision to adhere to *Avena* as the product of "delicate and complex calculations . . . taking into account" a number of factors, including "the need for the United States to be able to protect Americans abroad, the international legal obligations of the United States, judgments about the likely responses of various foreign countries to potential United States actions with respect to the Vienna Convention, and other United States foreign policy interests").[13]

Against this background, the refusal of state courts to adhere to *Avena* will undermine America's credibility as a global leader and seriously hinder foreign policy objectives at a critical time in our nation's history. The United States has long declared that the right to consular access guaranteed by the VCCR is "widely accepted as the standard of international practice of civilized nations."[14] Through its diplomats, our government routinely calls on such nations as Iraq, Syria, China, and North Korea to abide by this minimal standard when U.S. citizens are detained abroad.[15]

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[13] Significantly, the U.S. Government brief also asserts that applying the "review and reconsideration" of VCCR claims as set forth in *Avena* will be easy for state courts to accomplish. *See id.* at 29.

[14] Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 Hous. J. Int'l L. 375, 385 (1997) (quoting telegram sent from U.S. Department of State to its Embassy in Damascus on February 21, 1975 [hereinafter Damascus Telegram], *as reprinted in* Luke T. Lee, *Consular Law and Practice* 145-46 (2d ed. 1991)).

[15] S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 St. Mary's L.J. 719, 729 (1995) (noting U.S. protest of delay in notification of detention of U.S. missionaries in El Salvador); Transcript of State Dep't Regular Briefing, Fed. News Serv., Aug. 19, 1999 (James Rubin, State Dep't spokesman, reporting on request for access and immediate grant of access to U.S. citizen detained in China); Associated Press, *Iraqis Refuse Access to Americans for Second Day*, Apr. 19, 1995 (quoting State Department

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The United States not only drafted the amendment that ultimately became Article 36, but also led the effort to convince nations throughout the world to confer compulsory jurisdiction on the ICJ, precisely because American foreign policy officials realized that diplomatic overtures alone were insufficient to enforce the VCCR.[16] Over two decades ago, when Iran famously violated the VCCR by taking U.S. diplomats hostage in Tehran, then flouted its obligation under the Optional Protocol to comply with the ICJ's order to release the hostages, then-President Carter accused Iran of showing "'contempt, not only for international law, but for the entire international structure for

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spokesman: "Obviously, we are extremely disappointed that the Iraqi government has reneged on its promise to allow these weekly visits. We're disappointed because that is their legal obligation under the Vienna Convention."); Transcript of State Dep't Regular Briefing, Fed. News Serv., July 15, 1999 (James Rubin, State Dep't spokesman, commenting on detention of U.S. female citizen: "We remind the government of North Korea of its obligations under the Interim Consular Agreement of 1994 and the Vienna Convention on Consular Relations to permit consular access to detained U.S. citizens."); *see also* Lee, *supra* note 14, at 145-46 (documenting U.S. invocation of the VCCR); Brief of Former United States Diplomats as *Amici Curiae* in Support of Petitioner Jose Ernesto Medellin at 17 & n.26, *Ex Parte Jose Ernesto Medellin*, No. AP-75,207 (Tex. Crim. App. Jun. 22, 2005) [hereinafter Diplomats CCA Brief], *available at* http://www.debevoise.com/publications/pdf/BriefAmiciCuriaeofFormerUSDiplomats.pdf (last visited Dec. 18, 2005).

[16] *See* Brief for Ambassador L. Bruce Laingen and Lt. Col. John J. Swift et al. as *Amici Curiae* Supporting Petitioners at 6-16, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928); Brief for International Law Experts as *Amici Curiae* Supporting Petitioners at 11-13, 15-21, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928) (describing the U.S. role in the creation and implementation of the VCCR); Luke T. Lee, *Vienna Convention on Consular Relations* 111, 113 (1966); *see also* Sen. Exec. Rep. 91-9, at 19 (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration of the State Dep't); U.N. Conference on Consular Relations, Mar. 4–Apr. 22, 1963, *Official Records*, 1st Comm., 29th mtg., ¶¶ 36, 54, U.N. Doc A/CONF.25/16 (1963); *id.* at plenary mtg., 21st mtg., ¶¶ 17-20.

securing the peaceful resolution of differences among nations.'"[17]

Today, our closest allies now accuse the United States of showing similar disregard for the VCCR and the ICJ. Through numerous calls, meetings, and letters to both state and federal authorities, our allies have strenuously requested review and reconsideration of the convictions and sentences of their citizens who were denied their VCCR rights despite orders of the ICJ.[18] There are few, if any, areas of our foreign policy in which *Amici* can recall hearing so consistently from foreign heads of state, foreign ministers, and foreign ambassadors pleading for the enforcement of U.S. treaty obligations.

International and regional human rights bodies have echoed the vigorous protests of foreign governments. The Inter-American Commission on Human Rights, the European Parliament, and the U.N. High Commissioner for Human Rights have each strongly criticized U.S. violations

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[17] Philippe Sands, *An Execution Heard Around the World*, L.A. Times, Apr. 16, 1998, at B9 (quoting President Carter's comments during the Iranian hostage crisis).

[18] *See, e.g.*, Ginger-Thompson, *An Execution in Texas Strains Ties with Mexico and Others*, N.Y. Times, Aug. 16, 2002, at A6 (citing call from President Fox of Mexico); Laura LaFay, *World Court – U.S. To Halt Execution*, Virginian-Pilot, Apr. 10, 1998, at A1 (describing protests by Mother Teresa, Pope John Paul II, and Italiar government to execution of Italian citizen); Somini Sengupta, *Appeal in Murder Cites International Treaty*, N.Y. Times, Dec. 23, 1997, at B5 (letter from Ecuadorean Consul General); David Schwartz, *Plan To Execute German Killers Attracts Scrutiny*, Dallas Morning News, Feb. 22, 1999, at A1 (describing efforts by then-German President Herzog, Chancellor Schroeder, Foreign Minister Fischer, and Ambassador Chrobog requesting support for clemency from President Clinton and Arizona Governor Hull); *see also* Rodrigo Labardini, *International Court of Justice Finds U.S. Breached Its Obligations Under the Vienna Convention on Consular Relations*, 20 Int'l Enforcement L. Rep. 250, 251 n.8 (June 2004) (documenting six letters sent by the government of Mexico to the United States regarding the execution of Irineo Tristan Montoya by Texas in 1997); Diplomats CCA Brief at 18 & n.29.

of the VCCR.[19] The European Union has lodged numerous official demarches with state authorities requesting reconsideration of pending executions because of violations of the VCCR.[20]

The widespread international opposition to the several States' persistent practice of violating the VCCR and the ICJ decisions construing that treaty has undeniably harmed our global position as a human rights leader.[21]

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[19] *See, e.g.*, *Villareal v. United States*, Case 11.753, Report No. 52/02, Inter-Am. C.H.R., ¶¶ 69-70 (2002) (describing notification of the right to consular assistance as "among the minimum guarantees essential for foreign nationals also to adequately prepare their defense and receive a fair trial" and stating that failure to notify of such rights violated Mexican national's right to due process); *Resolution on Death Sentence Handed Down on Greg Summers in Texas, USA*, B4-0188/99, 1999 O.J. (C 150) 383-84 (passing resolution condemning persistent U.S. failure to notify foreign nationals of rights to consular access and noting "demonstrably extremely poor quality" of defense counsel in case of two German brothers on death row who had not had consular assistance); Kevin Sullivan, *Mexico Challenges U.S. on Death Penalty Cases*, Wash. Post, Jan. 10, 2003, at A17 (citing concerns expressed by U.N. High Commissioner for Human Rights regarding the execution of Javier Suarez Media, a Mexican citizen, because of the denial of his rights under the VCCR by the state of Texas); Dana Priest & John M. Goshko, *Genocide Warning Center Established; Clinton Human Rights Initiatives Include Changes at INS*, Wash. Post, Dec. 11, 1998, at A52 (referring to a speech by U.N. High Commissioner for Human Rights before U.N. General Assembly, criticizing the execution of Joseph Stanley Faulder, a Canadian citizen, because of the denial of his rights under the VCCR by the state of Texas); Diplomats CCA Brief at 19-20 & n.32.

[20] Demarches by the European Union have been filed in a number of cases, including: (1) Joseph Stanley Faulder, Canada, Dec. 8, 1998; (2) Miguel Angel Flores, Mexico, Nov. 3, 2000; (3) Hung Thanh Le, Vietnam, Dec. 4, 2003; (4) Gregory Madej, Poland, May 1, 2001; (5) Javier Suarez Medina, Mexico, July 23, 2002; (6) Osvaldo Torres, Mexico, Apr. 30 and May 6, 2004; (7) Gerardo Valdez Maltos, Mexico, June 5 and July 13, 2001.

[21] *See, e.g.*, George Boehmer, *Killer Loses Fight for Life*, Daily Tel. (Sydney, Australia), Mar. 4, 1999, at 25 (quoting the German parliament's Human Rights Committee Chairman Roth's reaction to the

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State noncompliance with these rulings has undermined our authority in several important international human rights bodies.[22] International disapproval of our noncompliance with the VCCR has also deflected attention away from serious human rights abuses in other countries. Actions of the several States in violation of the VCCR and the ICJ decisions construing that treaty have provided our adversaries with diplomatic ammunition to challenge the sincerity of our own commitment to human rights and the rule of law in international relations.[23] As the German

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LaGrand execution: "When [Secretary of State Madeleine] Albright talks of human rights, for example in China, she must prove her credibility by also taking human rights in the United States seriously."); Amnesty International, *The Execution of Angel Breard: Apologies Are Not Enough*, *at* http://web.amnesty.org/library/Index/engAMR51027 1998 (May 1, 1998) (quoting Paraguayan Deputy Foreign Minister Rachid: "[T]here is not an international summit at which they [the U.S. government] do not preach the preservation of human rights. . . . [T]he United States has been the champion of democracy . . . let them be the first one to demonstrate to us the principles of democracy; let them also respect human rights.") (last visited Dec. 21, 2005); Diplomats CCA Brief at 19-20 & n.34.

[22] Shortly after the LaGrand executions occurred despite a contrary ICJ provisional measures order, the United States was voted off the U.N. Commission on Human Rights in 2001 for the first time in that body's 54-year history. Barbara Crossette, *For First Time, U.S. Is Excluded from U.N. Human Rights Panel*, N.Y. Times, May 4, 2001, at A1. Shortly thereafter, the United States likewise failed to win a seat on the Inter-American Commission on Human Rights for the first time since that body's inception in 1959, and its observer status in the Council of Europe – which bans executions – has been put in jeopardy, in part because of U.S. executions of foreign nationals who had not been counseled under the VCCR. Connie de la Vega, *Going It Alone*, Am. Prospect, July 2004, at A22.

[23] *See, e.g.*, Raymond Bonner, *Mexican Killer Is Refused Clemency by Oklahoma*, N.Y. Times, July 21, 2001, at A8 (quoting Mexican government as declaring Oklahoma's execution of Mexican national denied VCCR rights as "contrary to international law and the elemental principles of cooperation between nations"); Roger Cohen, *U.S. Execution of German Stirs Anger*, N.Y. Times, Mar. 5, 1999, at 14 (quoting German Justice Minister, declaring that Arizona's execution of the two LaGrand brothers "is barbaric and unworthy of a [nation] based on the

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Justice Minister stated in announcing Germany's suit against the United States in the ICJ to challenge the execution of two German nationals who were denied consular rights: "Respecting international laws cannot be a one-way street."[24] So long as the United States continues to promote the rule of law around the world, other nations will equally demand that we set an example by complying strictly with our own binding obligations under the U.N. Charter, the ICJ statute, and the VCCR.

Taken together, continued state noncompliance with our obligations under the VCCR has significantly hampered the ability of the President, *Amici*, and other diplomats to carry out foreign policy initiatives. In *Amici*'s experience, a significant proportion of important bilateral and multilateral meetings with our closest allies is now consumed with answering diplomatic demarches challenging these practices, rather than addressing issues more central to our core national foreign policy interests.

Allowing state courts to keep ignoring the ICJ's interpretation of Article 36 in *Avena* and *LaGrand* would inevitably harm our diplomatic relations with our closest allies. Foreign hostility stirred by the U.S. practice of executing foreign nationals who were denied their VCCR rights has triggered fierce press criticism and even angry demonstrations in front of U.S. embassies abroad.[25] Such

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rule of law"); David Stout, *Do As We Say, Not As We Do: U.S. Executions Draw Scorn from Abroad*, N.Y. Times, Apr. 26, 1998, § 4 (Week in Review), at 4 (quoting Honduran newspaper upon execution of Honduran national denied rights under the VCCR: "The most powerful country in the world, which claims to be a stickler for justice and legal rectitude, has violated its own precepts.").

[24] *See Germany Sues U.S. for Breaking Law*, Reuters, Sept. 16, 1999, *available at* http://www.ub.es/penal/historia/PdeM/dpicintl.html (last visited Dec. 19, 2005).

[25] *See* Brian Knowlton, *Execution Pits Mexico Against U.S.; Fox Echoes World on Death Penalty*, Int'l Herald Trib., Aug. 16, 2002, at 1 (documenting intense media attention in Mexico); Colin Nickerson, *Canadians Protest a Texas Execution; Inmate Set To Die Today for 1975*

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protests have seriously disrupted important diplomatic missions, and at times, even threatened the physical safety of U.S. diplomats and embassy staff trying to work in these countries.[26]

Killing, Boston Globe, Dec. 10, 1998, at A2 (describing the execution of Stanley Faulder as a "cause celebre . . . dominating front pages and television newscasts" in Canada); Stout, *supra* note 23 (citing protest in front of U.S. embassy in Paraguay); *Paraguay Angered by US Execution*, BBC News, Apr. 15, 1998, *available at* http://news.bbc.co.uk/1/hi/world/americas/78602.stm (last visited Dec. 21, 2005) (documenting public outcry and inundation of radio channels in Paraguay with angry calls); Adam E. Jacobs & Mark A. Berman, *Rediscovering the Right to Consul*, N.J. L.J., Mar. 2, 1998, at 32 (describing demonstration in front of U.S. Consulate in Ecuador); *Texas Executes a Mexican Killer, Raising a Furor Across the Border*, N.Y. Times, Mar. 26, 1993, at A15 (describing protests). After Arizona executed Jose Roberto Villafuerte, a Honduran national, 500 Hondurans protested at the U.S. Embassy in Tegucigalpa, and Honduran newspapers reported retaliatory threats against the lives of U.S. citizens in Honduran prisons. *Nicaragua Solidarity Network of Greater New York, Hondurans Protest Execution in U.S.*, Weekly News Update on the Americas, Apr. 26, 1998, *available at* http://www.tulane.edu/~libweb/RESTRICTED/WEEKLY/1998_0426.txt (last visited Dec. 21, 2005). In 1999, to protest the execution of a Canadian who had been denied his rights under the VCCR, local activists planned demonstrations and other organized protests, including letter-writing campaigns and threatened economic boycotts. *U.N. Official Frets over Canadian's Texas Execution; Ottawa Steps Up Bid To Spare Albertan Convicted of Murder*, Toronto Star, Nov. 26, 1998, at A9; *Texas Embroiled in International Legal Rights Dispute Over Preparations To Execute a Canadian Citizen* (NPR Morning Edition broadcast, Dec. 9, 1998); Diplomats CCA Brief at 22 & n.31.

[26] During public demonstrations in front of the U.S. embassy in Honduras to protest the execution of a Honduran who had not been given timely access to the consular officials, more than 4000 U.S. personnel, including diplomatic staff, had to be protected by armed security. *See U.S. Boosts Security in Honduras As Tempers Flare*, Reuters, Apr. 24, 1998; Stout, *supra* note 23. After the execution of Tristan Montoya, a Mexican who had been denied his rights under the VCCR, Mexicans issued death threats and U.S. tourists were given warnings to stay out of certain areas. Armando Villafranca, *Life and Death Chasm*, Hous. Chron., Sept. 28, 1997, at A1.

As U.S. diplomats, *Amici* have sought fully to discharge U.S. responsibilities under the VCCR to encourage the fullest reciprocal protection for American citizens who are detained while living or traveling abroad.[27] For the same reason, for more than half a century, the United States has vigorously protected its right of consular access to American citizens held abroad through the ICJ.[28] To protect our own nationals, the United States expects to gain consular access within seventy-two hours for any and all U.S. citizens and diplomats who are taken into foreign custody. U.S. Department of State, Consular Notification and Access, Part 3: FAQs, *available at* http://travel.state.gov/law/consular/consular_748.html (last visited Dec. 19, 2005). It would be all too easy for foreign governments to ignore those requests if U.S. courts could simply refuse to respect the VCCR at home, in the face of a directly applicable treaty interpretation rendered by the ICJ.

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[27] In a 1975 telegram to the Syrian Embassy, the State Department confirmed that the United States's willingness to provide consular access to foreign nationals rests in good measure upon expectations of reciprocity from our treaty partners. *See* Damascus Telegram, *as reprinted in* Lee, *supra* note 14 ("The recognition of these rights is prompted in part by considerations of reciprocity. . . . The Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to these nationals.").

[28] As early as 1954, the United States sought to bring suit in the ICJ against Hungary, challenging Hungary's failure to provide consular access before trial to four U.S. airmen whose plane had been shot down. *See Treatment in Hungary of Aircraft and Crew of the United States of America* (*U.S. v. Hung.*), 1954 ICJ Pleadings 19-20, 31, 35-36. The suit was eventually dismissed for lack of jurisdiction over Hungary, which had not yet signed the Optional Protocol. 1954 ICJ 99 (July 12); *see also Case Concerning United States Diplomatic and Consular Staff in Tehran* (*U.S. v. Iran*), 1980 I.C.J. 3 (May 24).

II. State Courts Disrupt the Diplomatic Interests of the United States When They Ignore the ICJ's Rulings That Article 36 of the VCCR Creates Judicially Enforceable Individual Rights That Must Be Given Full Effect Despite Local Procedural Bars.

A. The ICJ's Ruling Regarding Enforceable Rights Benefits U.S. Diplomatic Interests by Promoting Stricter Enforcement of the VCCR.

The ICJ has repeatedly and explicitly held that the VCCR creates a judicially enforceable individual right.[29] In so holding, the ICJ specifically rejected claims by the United States that the rights in question are somehow rights of States and not individuals. In *LaGrand*, for example, the ICJ carefully read the text, history, negotiations, and practical construction adopted by the parties to the VCCR to conclude "that [VCCR] Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person."[30]

Notwithstanding that declaration, the Oregon Supreme Court invoked a broad "presumption *against* the creation of individual, judicially enforceable rights" by means of treaties. *State v. Sanchez-Llamas*, 108 P.3d 573, 576 (Or. 2005). In fact, the VCCR gives rise to no such presumption. This Court has long recognized that self-executing treaties

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[29] *See supra* Part I; *see generally* Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 Mich. J. Int'l L. 565, 596 (1997) (concluding from an examination of the travaux preparatoires of the VCCR that the general intent of the drafting parties in Article 36 was to create individual rights).

[30] *LaGrand*, at ¶ 77; *see also id.* ¶¶ 38, 42, 74, 78, 126; *Avena*, at ¶¶ 35, 40, 124, 139-40 (rejecting U.S. position that Article 36 rights are not individual rights).

may create judicially enforceable individual rights.[31] During the Senate hearings on the VCCR, the State Department advised the Senate that the "Convention is considered entirely self-executive and does not require any implementing or complementing legislation."[32] The ICJ rulings in *LaGrand* and *Avena* therefore define self-executing treaty obligations of the United States, which are the supreme law of the land under Article VI of the U.S. Constitution, and hence binding rules of decision to be applied by all state courts acting upon legal claims of the kind at issue here.[33]

Requiring the several States to recognize Petitioners' individual rights would plainly advance U.S. diplomatic interests. Ever-increasing numbers of Americans work and travel abroad each year, in an expanding array of foreign countries. As of 2004, over 160 countries were signatories to the VCCR.[34] State-to-state enforcement of the VCCR through the already overburdened diplomatic process necessarily provides only partial protection to American

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[31] *Cf. United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) (if a treaty "is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation"); *accord Sosa v. Alvarez-Machain*, 542 U.S. 692, 727, 734-35 (2004) (distinguishing rights under a treaty that the political branches have declared to be non-self-executing, and those under a self-executing treaty such as the VCCR).

[32] Sen. Exec. Rep. 91-9, at 5 (statement of J. Edward Lyerly, Deputy Legal Advisor for Administration of the State Dep't); *see also* Restatement (Third) of the Foreign Relations Law of the United States, Intro. Note preceding § 464 (3d ed. 1987).

[33] When ratification of the VCCR was pending, the Senate asked: "What is the effect of the convention on (a) Federal legislation; and (b) State laws?" The State Department answered, in relevant part: "To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern as in the case of bilateral consular conventions." Sen. Exec. Rep. No. 91-9, at 18.

[34] *See* Status of Multilateral Treaties Maintained by the U.N. Secretary General, *available at* http://untreaty.un.org/sample/EnglishInternetBible/partI/chapterIII/treatyb.asp (last visited Dec. 18, 2005).

citizens traveling abroad. The ICJ's construction of Article 36 of the VCCR to require judicially enforceable individual rights preserves diplomatic relations by enabling detained Americans to use private enforcement in lieu of, or as a supplement to, this overextended diplomatic process.

The high priority that the President has placed on defeating international terrorism and protecting national security requires governments and their respective intelligence agencies to cooperate closely through diplomatic channels. Yet when the several States refuse to respect our consular obligations, it is only a matter of time before those diplomatic relations become strained. Americans detained abroad are far less likely to receive their consular rights when the country detaining them can charge the United States with having failed to comply with its own diplomatic obligations.[35] For a state court to refuse to acknowledge that the VCCR provides a judicially enforceable individual right undermines the effective enforcement of the VCCR, and places even more pressure on overworked American diplomats.

It is for these reasons, among others, that other national courts – in Germany and Canada, for example – have accepted as binding the ICJ's interpretation that the VCCR creates judicially enforceable individual rights. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov.

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[35] For example, in 1995, an American citizen, Harry Wu, was arrested in China, charged with espionage, and held incommunicado for over a week. U.S. State Department attempts to gain access to Mr. Wu were rebuffed by China on the pretext that, on at least two prior occasions, U.S. authorities had failed to comply with a minor provision of the U.S.-China Consular Convention far less important than VCCR Article 36 (the requirement that each party report the death of any foreign national to the deceased's consulate). *U.S. Says China Misled It on Scholar's Whereabouts; Envoy Says He Took 12-Hour Taxi Ride in Remote Region Based on Misinformation*, S.F. Examiner, July 4, 1995, at A12 (noting the Wu situation had harmed U.S.-China relations); Transcript of U.S. State Dep't Press Briefing, July 6, 1995, 1995 WL 407848, at *12-14 (F.D.C.H.) (State Dep't Spokesman Nicholas Burns).

7, 2001, 5 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 116 (F.R.G.); *Regina v. Partak*, [2001] 160 C.C.C.3d 553, ¶¶ 25-26 (Ont. Super. Ct.) (Canada), *available at* 2001 CarswellOnt 4954 (Westlaw). Moreover, in its first encounter with this question, this Court acknowledged that the VCCR "arguably confers on an individual the right to consular assistance following arrest." *Breard*, 523 U.S. at 376. Following *Breard*, the lower courts have generally assumed, for the purposes of the cases before them, that a judicially enforceable individual right exists.[36] In erroneously rejecting the enforceability of Article 36 rights, the Oregon Supreme Court thus acted inconsistently not just with the binding and supreme law of the land, but also with the clear thrust of precedents of this Court and other lower courts.

B. The ICJ's Refusal To Recognize State Procedural Bars Benefits U.S. Diplomatic Interests.

In *Bustillo*, the Virginia court held that a state procedural default rule could be applied to foreclose a VCCR claim. But the VCCR is precisely the kind of treaty that the Framers had in mind when they chose to render treaties supreme over inconsistent state law. Virginia's and Oregon's noncompliance with the ICJ's ruling in *Avena* defies the authority of the federal government to bind the States to international obligations. Left unchecked, the persistent failures of Virginia, Oregon, and other States of the Union to comply with *Avena*'s interpretation of the

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[36] *See, e.g.*, *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999) ("In light of the language in Article 36 and the above cited authority, the Court finds that [defendants] have an individual right to consular notification under Article 36 which in turn grants them standing to object to a violation of that provision."); *State v. Lopez*, 633 N.W.2d 774, 783 (Iowa 2001) (collecting cases).

VCCR will inevitably alienate this nation from its closest allies.

The ability of the United States to present a credible diplomatic face to the world turns critically upon the national government's ability to make authoritative commitments to international agreements. For that reason, this Court repeatedly has recognized that "[n]o State can rewrite our foreign policy to conform to its own domestic policies." *United States v. Pink*, 315 U.S. 203, 233 (1942); *see also id.* ("Power over external affairs is not shared by the states; it is vested in the national government exclusively."); *Crosby*, 530 U.S. at 377 ("Quite simply, if the [state] law is enforceable the President has less to offer and less economic diplomatic leverage as a consequence."). Under the Articles of Confederation, the Continental Congress possessed the treaty power, but could not effectively enforce treaty obligations upon the States.[37] As a result, States were able to undermine agreements negotiated on behalf of the United States as a whole – leading to international skepticism of the fledgling United States as a dependable treaty partner.

In responding to the diplomatic paralysis resulting from the diverging state stances on foreign policy, the Framers specifically included treaties under the Supremacy Clause of the Constitution as part of the "Supreme Law of the Land," U.S. Const. art. VI, cl. 2. By so doing,

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[37] Article IX of the Articles of Confederation granted Congress sole and exclusive power to make treaties and alliances, but subject to the restriction "that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." Articles of Confederation and Perpetual Union, art. IX. The Continental Congress, however, had no authority to regulate interstate or foreign commerce. *See id.* art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.").

the Framers sought to guarantee, in John Jay's words, that "treaties . . . will always be expounded in one sense and executed in the same manner – whereas adjudications on the same points and questions, in [the several] States, . . . will not always accord or be consistent."[38]

In *Avena*, the ICJ noted that nine States had violated Article 36(1) of the VCCR a total of fifty-one times by failing to provide detained Mexican nationals with their consular rights under the treaty. *See Avena* at ¶ 15. These violations have damaged relations between the United States and its closest allies.[39]

The ICJ consistently has ruled that the application of procedural default rules to prevent individuals from raising claims under Article 36(1) of the VCCR violates Article 36(2) of the VCCR, which requires states to give "full effect" to the consular rights enumerated in Article 36(1). This Court's failure to direct the several States to adhere to the ICJ's interpretation of Article 36 would allow those States to undermine the United States' diplomatic credibility and prevent the United States from speaking with one voice.

Allowing individual States to apply procedural bars to block the effective implementation of Article 36 rights

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[38] The Federalist No. 3, at 15 (John Jay) (Robert Scigliano ed., 2000).

[39] Officials of our nearest neighbors have openly declared that the failure of American state authorities to provide their nationals with timely consular access has "strain[ed]" bilateral relations. Raymond Bonner, *U.S. Bid To Execute Mexican Draws Fire*, N.Y. Times, Oct. 26, 2000, at A20 (quoting Jorge G. Castaneda, foreign policy advisor to Mexican President Fox). In 2002, even before the ICJ issued its final judgment in *Avena*, Mexican President Vicente Fox even took the extraordinary step of canceling a trip to President Bush's Texas ranch as " 'an unequivocal signal of rejection of the execution' " of a Mexican national who had not been informed of his consular rights. Knowlton, *supra* note 25, at 1 (quoting President Fox's representative); *see also* Nickerson, *supra* note 25, at A2 (describing statements by Canadian government officials responding to execution of Canadian citizen Stanley Faulder who had been denied consular rights).

would undermine the safety of Americans living and traveling abroad. There are currently at least twenty-five nations[40] – presiding over one-third of the world's population[41] – that have federal systems with diverse state laws, courts and procedures. If states and provinces in each of these countries could invoke local procedural bars to excuse noncompliance with the VCCR, as Virginia and Oregon have done here, the protections afforded by that treaty to detained American citizens would quickly become meaningless.

As diplomats, *Amici* have struggled to secure the States' cooperation in implementing VCCR obligations. In 1998, Secretary of State Madeleine Albright, a signatory to this Brief, wrote to the Governor of Virginia with regard to Angel Francisco Breard, a Paraguayan national for whom the ICJ granted a provisional measure directing the United States to stay his execution because Virginia officials had ignored his VCCR rights.[42] In requesting that the Governor exercise his powers to stay Breard's execution, Secretary Albright explained that she was "'particularly concerned about the possible negative consequences

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[40] Argentina, Australia, Austria, Belgium, Bosnia & Herzegovena, Brazil, Canada, Comoros, Ethiopia, Germany, India, Malaysia, Mexico, Micronesia, Nigeria, Pakistan, Saint Kitts & Nevis, Serbia & Montenegro, South Africa, Spain, Switzerland, Russia, United Arab Emirates, United States, Venezuela. *See* U.S. Department of State, Country Background Notes, *available at* http://www.state.gov/r/pa/ei/bgn/ (last visited Dec. 19, 2005). Indeed, the recently formed Republic of Iraq may soon become the newest member of the community of federalist nations and is one country in which a large number of Americans are almost certain to be present in the near future.

[41] Objectives, Center for the Study of Federalism, Temple University, *at* http://www.temple.edu/federalism/objectives.html (last visited Dec. 18, 2005).

[42] Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998), *quoted in* Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 Am. J. Int'l L. 666, 671-72 (1998).

[of the execution] for the many U.S. citizens who live and travel abroad.'"[43] It is precisely to ensure that foreign provinces cannot claim a right to violate national obligations that the State Department has since taken such great pains to instruct state and local law enforcement officials on the issue of consular notification.

Failure to hold the several States accountable for U.S. obligations under international law would set a dangerous precedent. As the first country designed on federalist principles, the United States historically has served as a model for many other nations. Indeed, many of these nations are seeking to reconcile their international obligations with their federal structures and continue carefully to observe U.S. practices.[44] A government's capacity to ensure the reciprocity critical to international cooperation among nations is only as strong as the compliance that those national governments can obtain from their federated parts.[45] This Court should not allow the several

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[43] *Id.* "'The execution of Mr. Breard in the present circumstances,'" Secretary Albright observed, "'could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention'" and "'could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad.'" *Id.*

[44] For example, Brazil recently passed a constitutional amendment that allows the Attorney General to "federalize" state court cases involving human rights violations. The relevant amendment states that this power shall be exercised in order to assure the fulfillment of obligations incurred by the Brazilian government through international human rights treaties. Emenda Constitucional No. 45, de 30 de dezembro de 2004, *available at* https://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc/emc45.htm#art109 (last visited Dec. 19, 2005) (author's translation).

[45] In India, for example, the laws of five states on "religious conversion" have so affected the work of Christian missionaries that the State Department's Consular Information Sheet for India specifically warns Americans who wish to engage in missionary activities in these states to seek legal advice regarding the state legislation. *See* U.S.

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States to erect parochial legal barriers that would render meaningless our foreign policy objectives and international obligations.

III. Allowing State Courts To Refuse To Enforce the *Avena* Ruling Also Would Damage U.S. Foreign Policy Interests Governed by Other Treaty Regimes.

As U.S. diplomats, *Amici* consistently have sought to ensure the proper functioning of the international treaty regimes to which the United States is a party. *Amici* believe that the state courts' failure to respect the ICJ's determinations in this context will threaten U.S. commercial and economic interests in other treaty regimes.

The ICJ dispute-settlement provisions in the VCCR are not *sui generis*. After World War II, when international trust and diplomacy were at a low ebb, the United States took the initiative to establish numerous treaties with its former enemies that resolved disputes through binding decisions of the ICJ.[46]

In return for our commitment to abide by ICJ judgments, the United States gained not only the cooperation of other states, but also a powerful diplomatic tool for encouraging non-judicial resolution of disputes.[47] Even

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Department of State, Consular Information Sheet: India, Aug. 24, 2005, *available at* http://travel.state.gov/travel/cis_pa_tw/cis/cis_1139.html (last visited Dec. 19, 2005).

[46] *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy, art. XXVI, 63 Stat. 2255, 2294; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, U.S.-F.R.G., art. XXVII, 7 U.S.T. 1839, 1867; Treaty of Peace with Japan, Sept. 8, 1951, art. 22, 3 U.S.T. 3169, 3188-89.

[47] Indeed, "[m]any cases are settled before a final judgment is reached," giving the ICJ "an important 'pacifying effect' on disputes at all stages of litigation." Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 Am. J. Int'l L. 434, 436 (2004).

nations with longstanding histories of extreme hostility toward one another have reached agreement on serious diplomatic disputes after referral (or threat of referral) to the ICJ.[48]

The "mutuality and reciprocity" that forms the foundation of international relations is particularly critical for the effective operation of our nation's commercial and economic treaties. *See generally United States v. Arjona*, 120 U.S. 479, 487 (1887) ("[I]nternational law obligations are of necessity reciprocal in nature."). The continuing ability of the United States to secure international treaty regimes vital to the realization of our national interests throughout the world, and to secure reliable enforcement of those regimes already in place, depends directly upon our reputation for honoring the international obligations that we undertake.

The last half of the twentieth century has witnessed the direct application of international trade agreements to a multitude of commercial relationships between individuals and nations. A vast array of agreements dealing with international trade and foreign investment now call for binding arbitration or resort to permanent international tribunals to resolve intractable disputes. Moreover, many important economic treaties vest compulsory jurisdiction in the ICJ, including international sovereign disputes

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[48] *See, e.g.*, *Trial of Pakistani Prisoners of War* (*Pak. v. India*), 1973 I.C.J. 328 (July 13), and 1973 I.C.J. 347 (Dec. 15) (dispute settled out of court). For example, when the United States inadvertently downed an Iranian civilian airliner, killing 290 passengers and crew, despite our strained diplomatic relations, Iran sought a peaceful solution by bringing suit before the ICJ, and the parties ultimately were able to achieve a negotiated settlement. *Aerial Incident of 3 July 1988* (*Iran v. U.S.*), 1989 I.C.J. 132 (Dec. 13), and 1996 I.C.J. 9 (Feb. 22).

ranging from the international recognition of copyrights[49] and patents[50] to the transport of goods by air.[51]

The United States has also agreed to submit to the jurisdiction of other binding arbitration mechanisms to protect U.S. trade and investment interests. Of most recent significance to commercial interests are Chapter 11 of the North American Free Trade Agreement ("NAFTA")[52] and the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") of the World Trade Organization ("WTO").[53] Together, NAFTA and the WTO grant private interests and sovereign nations, respectively, compulsory resort to binding arbitral tribunals.

The benefits stemming from these treaties and their binding dispute-resolution mechanisms are not illusory. Since 1996, American investors have initiated arbitral proceedings under NAFTA against the government of Canada at least eight times, and against the government of Mexico at least twelve times, with at least five of those cases resulting in compensation for the American investors, while

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[49] Universal Copyright Convention, art. XV, *opened for signature* Sept. 6, 1952, art. XV, 6 U.S.T. 2731, 2743, 216 U.N.T.S. 132, 146.

[50] Patent Cooperation Treaty, art. 59, *opened for signature* June 19, 1970, 28 U.S.T. 7645, 7708, 1160 U.N.T.S. 231, 262.

[51] International Air Transport Agreement, art. IV, § 3, *opened for signature* Dec. 7 1944, 3 Bevans 922, 925, 84 U.N.T.S. 389, 394; *see also* Convention on International Civil Aviation, ch. XVIII, art. 84 *opened for signature* Dec. 7, 1944, 3 Bevans 944, 966, 15 U.N.T.S. 295, 352.

[52] North American Free Trade Agreement, U.S.-Can.-Mex., ch. 11, Dec. 17, 1992, 32 I.L.M. 605, 639 (1993).

[53] In the DSU, WTO members agree to submit to binding arbitration of certain trade disputes, and are under an obligation "to have recourse to and abide by the rules and procedures" of the DSU. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 23(1), *in* Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Marrakesh, Apr. 15, 1994, 33 I.L.M. 1125, 1241 (1994).

six of the cases remain pending.[54] Similarly, 74 of the 324 disputes that have been initiated before WTO tribunals were brought by the United States as a complainant.[55]

There is no guarantee that the diplomatic fallout from the several States' ongoing flouting of the ICJ and the VCCR can be limited to those settings. We cannot expect other nations to abide by the judgments of international dispute-resolution and arbitral bodies, if our state courts regularly fail to accord comity and respect to the ICJ's treaty interpretation in *LaGrand* and *Avena*. Condoning the failure of the several States to comply with the treaty interpretation in *Avena* would damage U.S. interests under numerous treaty regimes that ensure the security of our citizens and safeguard our commercial interests, as well as undermine the United States's ability to negotiate new diplomatic covenants.

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[54] For a list of NAFTA Chapter 11 cases, see NAFTA Investor-State Arbitrations, *at* http://www.state.gov/s/l/c3439.htm (last visited Dec. 18, 2005), and NAFTA-Chapter 11-Investment, *at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-en.asp (last visited Dec. 18, 2005). *See also Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 760 (2004) (recognizing U.S. adherence to the decision of a NAFTA arbitration panel); *Canada v. S.D. Myers, Inc.*, [2004] F.C. 38, ¶¶ 37, 39 (affording a "high level of deference" to a NAFTA Tribunal in affirming a $7 million award to an American investor against the Canadian government, "so as to be sensitive to the need of a system for predictability in the resolution of disputes").

[55] *See, e.g.*, Panel Report, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/R/USA (May 22, 1997) (complaint by the United States); Panel Report, *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/R/USA (Aug. 18, 1997) (complaint by the United States). For a list of past and pending DSU cases, see WTO, Chronological List of Dispute Cases, *at* http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Dec. 18, 2005).

CONCLUSION

In cases such as this, this Court should look beyond narrow U.S. interests to the "mutual interests of all nations in a smoothly functioning international legal regime" and, whenever possible, should "consider if there is a course that furthers, rather than impedes, the development of an ordered international system."[56] For the foregoing reasons, *Amici* urge the Court to find that the nation's diplomatic, commercial, and economic interests will best be served by directing the state courts whose decisions are under review to adhere faithfully to the ICJ's interpretation of Article 36, as set forth in the *LaGrand* and *Avena* decisions.

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[56] *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 555, 567 (1987) (Blackmun, J., concurring in part and dissenting in part).

Madeleine K. Albright served as U.S. Secretary of State from 1997-2001 and as U.S. Ambassador and Permanent Representative to the United Nations from 1993 to 1997.

Morton Abramowitz, a Career Ambassador, served as Assistant Secretary of State for Intelligence and Research, U.S. Ambassador to the Mutual and Balanced Force Reduction Negotiations in Vienna, U.S. Ambassador to Turkey and Thailand, and Deputy Assistant Secretary of Defense for Inter-American, East Asian and Pacific Affairs.

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Jeffrey Davidow, a Career Ambassador, served as U.S. Ambassador to Mexico, Zambia, and Venezuela. From 1996 to 1998, he was Assistant Secretary of State for Inter-American Affairs.

Herbert J. Hansell served as the Legal Adviser of the U.S. Department of State from 1977 to 1979, Member of the Permanent Court of Arbitration, The Hague, from 1978 to 1980, and Senior Adviser and Ambassador to the Mideast Peace Negotiations in 1980. He served as Adviser to the United States Trade Representative on international investment in 1980, and as Adviser to the American Law Institute Restatement of the Foreign Relations Law of the United States.

James C. O'Brien served as Special Presidential Envoy for the Balkans from 2000 to 2001, as Principal Deputy Director of the State Department Policy Planning Staff

from 1998-2000, and as a State Department official from 1989 to 2001.

Thomas R. Pickering served as Under Secretary of State for Political Affairs from 1997 to 2001, and was the U.S. Ambassador and Permanent Representative to the United Nations from 1989 to 1992. A Career Ambassador, during his diplomatic career he also served as Assistant Secretary of State for Oceans, Environment and Science, U.S. Ambassador to The Russian Federation, India, Israel, El Salvador, Nigeria, The Hashemite Kingdom of Jordan, and as Executive Secretary of the Department of State and Special Assistant to the Secretary.

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IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

THE STATE OF OREGON

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF *AMICUS CURIAE* OF THE GOVERNMENT OF THE UNITED MEXICAN STATES IN SUPPORT OF PETITIONER MOISES SANCHEZ-LLAMAS

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INTEREST OF *AMICUS CURIAE*[1]

By signing and ratifying the Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, the Government of Mexico and the Government of the United States made commitments to each other, to their other treaty partners, and to the rule of law. Specifically, the United States pledged that detained Mexican nationals would be promptly informed of their right to consular notification, and that Mexico would be permitted to provide consular protection to those nationals. In turn, Mexico promised to extend those same rights to the United States and its nationals detained in Mexico. And by signing and ratifying the Optional Protocol to the Vienna Convention, the Government of Mexico and the Government of the United States agreed that irreconcilable disputes over the interpretation and application of the treaty's provisions would be resolved by the International Court of Justice ("ICJ"). Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325.

Despite the clear obligations set forth in Article 36, United States authorities have repeatedly failed to advise detained Mexican nationals of their rights to consular notification and access. And over the last several years, Mexico has repeatedly sought to obtain legal remedies for those violations. Mexico has engaged in diplomatic negotiations with the United States, filed numerous amicus

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[1] Counsel for all parties have filed letters with the Court consenting to the filing of all *amici*. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the Government of Mexico, has made a monetary contribution to the preparation of this brief.

briefs in state and federal courts, and obtained an advisory opinion from the Inter-American Court on Human Rights, all to no avail. Finally, on January 9, 2003, Mexico exercised its right to initiate proceedings before the ICJ under the Optional Protocol to the Vienna Convention. On March 31, 2004, after reviewing the parties' extensive written and oral submissions, the ICJ issued its final judgment in *Avena and Other Mexican Nationals*.

Mexico has a direct interest in full compliance with the *Avena* Judgment and with the obligations set forth in the text of Article 36. The very purpose of Article 36 is to permit the nations that signed the Vienna Convention – including Mexico, the United States, and many other countries – to protect the interests of their citizens when they are arrested or otherwise detained while living, working, or traveling abroad. That interest is most acute when a citizen is facing trial in another country for a crime that may lead to severe sanctions, such as lengthy imprisonment or death.

SUMMARY OF ARGUMENT

Mexico and the United States share a common interest in protecting the rights of their nationals abroad. In the last sixty years they have signed no fewer than three instruments cementing their commitment to consular notification and access.

Mexican law has long required consular officers to assist and advise detained nationals in their dealings with local authorities. To that end, Mexico has developed the most extensive consular network of any foreign nation in the United States. Consular officers act as cultural interpreters for Mexican nationals who are frightened by authority and isolated from their family and friends. The vast majority of

detained Mexican nationals are indigent, having immigrated to the United States from impoverished, rural communities. On average, they have no more than a sixth-grade education. For these detained nationals, the rights conferred by Article 36 of the Vienna Convention are no mere technicality.

Prompt compliance with the provisions of Article 36 is required by its text. Indeed, the United States has insisted on *immediate* compliance with Article 36 in addressing the situation of United States citizens detained in Mexico. On this, both Mexico and the United States agree: prompt consular access is essential to safeguard the rights of their detained nationals at a time when they are most vulnerable. Nevertheless, local authorities in the United States often fail to carry out their obligations under Article 36, preventing Mexican consular officers from carrying out their functions and depriving Mexican nationals of consular assistance during their detention and prosecution for serious criminal offenses.

In 2003, when it became clear that Mexico and the United States could not agree on the appropriate remedy for breaches of Article 36, Mexico exercised its right to submit the dispute to the ICJ for binding resolution. In doing so, Mexico sought – and obtained – a binding determination of the remedies that must be applied in *all* cases of its nationals who are subject to prolonged incarceration or severe penalties and who were not advised of their Article 36 rights.

The ICJ's final judgment in *Avena and Other Mexican Nationals* provides the framework under which Mr. Sanchez-Llamas's legal claims must be reviewed. The *Avena* judgment reaffirmed in the clearest possible terms that Article 36 of the Vienna Convention confers individual

rights on all Mexican nationals who are detained or arrested in the United States. The ICJ also determined that Mexican nationals subject to severe penalties or prolonged incarceration are entitled to meaningful judicial review by courts that are empowered to craft appropriate legal remedies for Article 36 violations.

In accordance with the terms of the *Avena* judgment, Mr. Sanchez-Llamas is entitled to judicial review and reconsideration of his conviction and sentence that gives full weight to the violation and its effects. But the lower courts abrogated their responsibility to conduct this review by concluding, first, that Mr. Sanchez-Llamas had no justiciable rights under Article 36, and second, that he was not entitled to the remedy of suppression. Each of these determinations is inconsistent with the final judgment of the ICJ, and cannot be upheld.

ARGUMENT

I. Mexico and the United States Have Repeatedly Pledged to Enforce the Rights of Consular Notification and Access.

Ever since Mexico and the United States established diplomatic relations, the two countries have been actively involved in the protection of their nationals within the other's territory. *See generally* Brief Amicus Curiae of the Government of the United Mexican States in Support of Petitioner, *Medellín v. Dretke,* 125 S. Ct. 2088 (2005) at 4-10. In 1942, the two countries signed a bilateral consular convention that codified the customary rights of consular officers to assist their nationals. Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.- Mex., art. VI, 57 Stat. 800

("Bilateral Consular Convention"). Among other things, the Bilateral Consular Convention grants consular officers the right to visit detained nationals, to assist them "in proceedings before or relations with authorities of the State," and to "address the authorities, National, State, Provincial or Municipal, for the purpose of protecting the nationals of the State by which they were appointed in the enjoyment of rights accruing by treaty or otherwise." Bilateral Consular Convention, art. VI(2). The Bilateral Consular Convention likewise confers rights on detained nationals, who "shall have the right at all times to communicate with the consular officers of their country." *Id.*, art. VI(3).

The 1963 Vienna Convention on Consular Relations reaffirmed the rights set forth in the bilateral convention and elaborated on the types of services consular officers could provide. For example, article 5 of the Vienna Convention states, *inter alia*, that "[c]onsular functions consist in . . . helping and assisting nationals . . . [and] representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State." Vienna Convention, arts. 5(e), 5(i). Article 36(1)(c) reinforces these provisions, expressly stating that consular officers may "arrange for [the] legal representation" of detained nationals. *Id.*, art. 36(1)(c).

Significantly, the Optional Protocol to the Vienna Convention gave states parties an additional avenue for dispute resolution that was unavailable under the bilateral consular convention. The United States was the leading proponent of this instrument,[2] which provides:

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[2] *See Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees*, U.N. Conference on Consular Relations, at

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol, art. 1.

In 1996, the United States and Mexico reaffirmed their commitment to safeguard the consular rights of detained nationals and to implement both Article VI of the Bilateral Consular Convention and Article 36 of the Vienna Convention by providing

> settings conducive to full and free exchange between the consular representatives and detained individuals in order to allow, consistent with the relevant laws of each country, consular officials to interview their respective nationals when they are detained, arrested, incarcerated or held in custody in accordance with Article VI, paragraph 2, section (c) of the Consular Convention between the United Mexican States and the United States of America of August 12, 1942, and in accordance with Article 36, first paragraph, of the Vienna Convention on Consular Relations of 1963.

Memorandum of Understanding on Consular Protection of Mexican and United States Nationals, May 7, 1996, U.S.–Mex., paras. 2, 3, Dept. of State File No. P96 0065-0984/0987.

249, U.N. Doc. A/CONF.25/16 (1963).

Within the framework of these instruments, both nations have developed comprehensive programs of consular assistance to their nationals abroad.

II. Mexican Consular Officers Enhance the Truth-Seeking Function of the Courts by Ensuring Their Nationals Are Full Participants in Criminal Proceedings.

Courts in the United States frequently misapprehend the nature of consular assistance. As a result, they often undervalue the services provided by consular officers in evaluating the harm caused by Article 36 violations. In Mexico's experience, however, consular assistance not only improves the quality of the defense, but also affects the critical choices made by its nationals facing serious criminal charges.

Detained foreign nationals "are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar." LUKE T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991) (quoting U.S. Dep't. of State, Telegram 40298 to Embassy Damascus, Feb. 21, 1975). As a jurist on the Inter-American Court of Human Rights has observed,

> consular protection "does not seek to govern the relations between equals, but rather to protect those ostensibly weaker and more vulnerable. . . . Foreigners under detention, in a social and juridical *milieu* and in an idiom different from their own and that they do not know sufficiently, experiment often a condition of particular vulnerability, which the right to information on consular assistance. . . seeks to remedy.

OC-16/99, Inter-Am. Ct. H.R. ¶ 23 (October 1, 1999) (Trinidade, J., concurring).

Mexican consular officers assist their detained nationals in the United States in overcoming these unique disadvantages. Mexican law expressly requires consuls "to assist and advise Mexicans in their dealings with local authorities." LEE, *supra,* at 127 (quoting *Ley Orgánica del Servicio Exterior Mexicano y su Reglamento*, Art. 88). Consequently, each of Mexico's forty-six consulates is staffed by consular officers trained to provide immediate and far-reaching assistance to Mexican nationals facing serious criminal charges. *See Valdez v. State* 46 P.3d 703, 710 (Okla. Crim. App. 2002) ("It is evident from the record before this Court that the Government of Mexico would have intervened in the case, assisted with Petitioner's defense, and provided resources to ensure that he received a fair trial and sentencing hearing").

Mexico's commitment to the protection of its nationals stems in part from its conviction, born of experience, that most Mexican nationals are poorly equipped to navigate the legal system of a foreign country. *See* Memorial of Mexico (*Mex. v. U.S.*), 2003 I.C.J. Pleadings (*Avena and Other Mexican Nationals*) A39, App. 7 (June 20, 2003) (Declaration of Roberto Rodríguez Hernández). Most Mexican nationals who immigrate to the United States speak little English, have no more than a primary school education, and come from impoverished communities.[3] Mexican

[3] Mr. Sanchez Llamas fits the typical profile of a Mexican immigrant. He grew up in a rural area of Mexico bordering the states of Guanajuato and Jalisco, and began working at the age of fourteen. Tr. (Motion to Suppress) vol. 1 at 196, 227. At the age of twenty-one, he immigrated

consular officers have observed that even nationals who have resided in the United States for many years retain a strong connection with Mexican culture. Some never learn to speak English fluently. They face problems assimilating to a foreign culture in which they are not fully accepted. As one commentator has observed,

> Mexican immigrants come to the United States to face grossly incorrect perceptions, negative stereotypes, both malignant and benign prejudices, hostility, and antipathy.

J. Palerm, B.R. Vincent, and K. Vincent, *Mexican Immigrants in Courts, in* IMMIGRANTS IN COURTS 96 (Joanne Moore, ed., 1999). *See also* Leo R. Chavez, SHADOWED LIVES: UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY 20-22 (2d ed. 1998).

Significant cultural and linguistic barriers impede the ability of Mexican nationals to communicate effectively with their attorneys and to participate fully in their defense. *See* Richard W. Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding,* 19 W. NEW ENG. L. REV. 193, 194-96 (1997). They have trouble grasping abstract legal concepts such as the right to remain silent and their right to have an attorney

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illegally to the United States, where he was a migrant worker in Florida and California. *Id.* at 227. As is typical of many Mexican migrants, he periodically returned to Mexico before re-entering the United States to work. *Id.* at 230. At the time of his arrest, he spoke little English, even though he had sporadically worked as a migrant laborer in the United States for approximately eleven years. *Id.* at 124, 143, 227.

present during the interrogation[4] – even after they are advised of their *Miranda* rights by the police. In part, this may be attributable to the substantial differences between the U.S. and Mexican criminal justice systems.

Under Mexican criminal law, statements given to the police during an interrogation are deemed to have no evidentiary value.[5] A defendant's statement is admissible evidence only if the statement was taken down before the prosecutor ("Ministerio Público") or judge and in the presence of counsel or "person of confidence" to the defendant.[6] Even if a defendant's statement has been taken in accordance with Mexican law, it cannot serve as the sole basis for his prosecution. CÓDIGO FEDERAL DE PROCEDIMIENTOS PENALES, art. 287. Consequently, Mexican nationals in the United States are sometimes surprised when their incriminating statements to the police become the centerpiece of the prosecution's case.

There is no such thing as "plea bargaining" in Mexico. Moreover, crimes are punished differently in

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[4] Even if a detained Mexican national comprehends his right to have a lawyer present during an interrogation, he may find it difficult to convey an "unambiguous request" for counsel as required by *Davis v. United States*, 512 U.S. 452, 459 (1994). As the Court itself has recognized, this rule disadvantages defendants with a lack of linguistic skills. 512 U.S. at 460. *See also* Floralynn Einesman, *Confessions and Culture: The Interaction of Miranda and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1, 32-33 (1999).

[5] CÓDIGO FEDERAL DE PROCEDIMIENTOS PENALES (Mexican Federal Code of Criminal Procedure), art. 287.

[6] *See* CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, (Political Constitution of the United Mexican Status), Title I, Ch. I, art. 20 (A)(II).

Mexico than they are in the United States. Particularly if they have had no prior contact with the United States's criminal justice system, Mexican nationals often fail to appreciate the gravity of the charges they are facing. Mexico's consular officers are therefore trained to advise Mexican nationals regarding the critical differences between the two countries' criminal justice systems. *See Ledezma v. State*, 626 NW.2d 134, 152 (Iowa 2001) (timely contact with Mexican consular officials "can eliminate false understandings and prevent actions which may result in prejudice to the defendant" since consular officers can explain the "significant differences between the American and Mexican criminal justice systems"); *State v. Ramirez*, 732 N.E.2d 1065, 1070-71 (Ohio App. 1999) (compliance with Article 36 obligations would have ensured that *Miranda* violation "would have been avoided" because "the American legal system would have been explained to appellant who, as a Mexican national, had not been exposed to nuances of our justice system the way that most Americans are"); *United States v. Rangel-Gonzales*, 617 F.2d 529, 532-33 (9th Cir. 1980) (even if Mexican Consulate "would have done nothing more than advise appellant of his right to counsel . . . it remains difficult from a practical standpoint to equate being advised by the [arresting authority] in an adversary setting with being advised by the Mexican Consulate.").

Upon learning that a Mexican national has been detained and charged with a serious crime, Mexico's consistent consular practice is to contact the national as soon as possible in order to explain his legal rights in a familiar language, and ensure that he truly understands the scope and significance of those rights within the United States legal system. Detainees are advised not to discuss their case or to sign any documents without consulting with an attorney.

These are not superfluous advisements: consular protection officers have reported many cases in which Mexican nationals have signed confessions written in English without understanding what they were signing. *See, e.g.*, David Heinzmann and Jeff Coen, *Jailed by Lies, Freed by Truth,* CHICAGO TRIBUNE, Dec. 22, 2002, at 1 (describing the case of Omar Aguirre, a Mexican national who was exonerated five years after he signed a written confession in English to a crime he did not commit). Police officers who speak little to no Spanish frequently conduct interrogations, leading to miscommunication and often unreliable statements. Jeff Coen, *With Cops as Interpreters, Suspects at Risk*, CHICAGO TRIBUNE, Aug. 14, 2003, at 1; Beth Musgrave, *Cities to Hire Full-Time Interpreters,* LEXINGTON HERALD-LEADER, Oct. 2, 2004, at B1 (describing botched interpretation of *Miranda* rights to defendant who was later acquitted).

In the case of a Mexican national who faces severe punishment, consular officers provide other crucial services as well.[7] Among other things, they can ensure the defendant receives qualified and effective legal counsel. Many assigned lawyers do not speak Spanish and rarely enjoy access to Spanish-speaking investigators and experts. Even when the national speaks English fluently, his family usually does not. Thus, counsel's inability to speak Spanish presents a substantial impediment to obtaining evidence from relatives and other key witnesses.

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[7] The extraordinary services that Mexican consular officers provide to nationals facing the death penalty are a matter of public record, and are described at length in Mexico's submissions to the ICJ. *See* Memorial of Mexico (*Mex. v. U.S.*) at 11-38; *Torres v. State,* 120 P.3d 1184 (Okla. Crim. App. 2005), 2005 Okla. Crim. App. LEXIS 12 at *8 (noting that the protection of Mexican nationals facing capital proceedings is one of the highest priorities of Mexican consular representatives).

Consular officers are therefore instructed to support the defense by acting as a "cultural bridge" between the defendant and his lawyer, communicating with the defendant's family members, friends and others who may be able to offer assistance or information vital to the defense, and tracking down records and other documents located in Mexico. *See Torres*, 2005 Okla. Crim. App. LEXIS at *8 ("Had the consulate been contacted, it would have monitored Torres's case, consulted with and offered assistance to his attorney, and helped gather evidence, particularly in preparation for the second stage of trial."). If consular officers conclude that the defense attorney is not able to provide high-quality representation, they attempt to secure more effective legal counsel, a function that is entirely consistent with the rights of consular officers under Article 36(c) of the Vienna Convention.

III. Prompt Compliance with Article 36 Is Essential to Protect the Rights of Detained Nationals at the Time When They Are Most Vulnerable.

By its plain terms, Article 36 requires the competent authorities to notify detained nationals of their consular rights "without delay." Vienna Convention, Art. 36(1)(b). As interpreted by the ICJ in its *Avena* Judgment, this phrase gives rise to an obligation to advise a detained foreign national of his Article 36 rights "as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national." *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31), ¶ 88 ("*Avena*").

Mexico and the United States have long recognized

that prompt consular access is critical to safeguard the rights of their nationals at a time when they are most vulnerable. For example, indigent Mexican nationals in the United States often spend days or even weeks in detention before they are appointed counsel.[8] During this time, they are confused and isolated. Mexican nationals who do not speak English have trouble communicating their most basic needs. Consular assistance is crucial to ensure that they understand their legal rights and the seriousness of the charges, to monitor their mental and physical health, and to put them in touch with their families. As noted above, Mexican consular officers are trained to contact detained nationals at the earliest possible opportunity to carry out these functions. In addition, consulates will sometimes retain legal counsel at this initial stage of the prosecution in order to provide legal advice to Mexican nationals facing serious charges.

The United States has been equally assiduous in seeking prompt access to detained U.S. citizens abroad. Indeed, U.S. consular officers are instructed to "make every effort to gain prompt personal access to an arrested U.S. citizen or national" in order, *inter alia*, to have "the opportunity to explain the legal and judicial procedures of

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[8] Benito Albarran Ocampo, an indigent Mexican national charged in 2005 with capital murder in Huntsville, Alabama, was without counsel for ten weeks. Mexico eventually retained counsel to represent him. In another case of a Mexican national charged with capital murder in Blair County, Pennsylvania, the court failed to appoint counsel for six weeks after the defendant's arrest in connection with a highly publicized triple homicide. After Mexico filed a motion objecting to the failure to appoint counsel, the court eventually assigned the office of the public defender to represent the accused. *See Commonwealth v. Padilla*, No. 2005 MD 1855 (Blair Co. Ct. Common Pleas Oct. 14, 2005) (order appointing counsel).

the host government and the detainee's rights under that government at a time when such information is most useful." U.S. Department of State, *Foreign Affairs Manual* (2004), § 7 Consular Affairs, 7 FAM 422 *Access*, at (f). These consular functions are critical, since

> [l]egal systems vary greatly, particularly outside common law areas. Arrested U.S. citizens or nationals often have an imperfect understanding of American criminal procedure and less or no understanding of the legal procedures of the country in which they are detained.

Id. 7 FAM 415.3 *Develop Judicial Materials*. The State Department has accordingly emphasized that one of the "fundamental responsibilities" of U.S. consulates is "helping Americans who are incarcerated; *advising them of their legal rights when they're incarcerated*, when their [sic] imprisoned in foreign countries; helping to get them legal assistance."[9]

Prompt access also ensures that consular officers "can provide the arrestee with a list of reputable lawyers or information concerning local legal aid before the arrestee selects a lawyer." *Id.* 7 FAM 422, *Access*, at (e). United States consular officers are therefore instructed to arrange a consular visit "within 24 hours," and if that is not possible, to "contact the detainee by telephone . . . [and] ask the detaining authorities to permit a private conversation." *Id.* 7 FAM 422.1-2 *Telephone Contact*.

In 1975, complaints by United States citizens incarcerated in Mexico led to congressional hearings. At

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[9] R. Nicholas Burns, Spokesperson, U.S. Department of State, Daily Press Briefing (Sept. 29, 1995) (emphasis added), *available at* http://www.hri.org/docs/statedep/1995/95-09-29.std.html.

those hearings, State Department representatives testified that in order to fully protect the rights of prisoners and prevent abuses, *immediate* consular access was critical:

> A particular issue of prime importance is that of denied or delayed consular access. We believe that *immediate* consular access is the linchpin on which hangs in large measure the solution to many of our problems. With early access to each prisoner we are convinced we can go a long way toward guaranteeing the prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures.

U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International, Political and Military Affairs, Part II, 94th Cong. 6 (1975) (Statement of Leonard F. Walentynowicz) (emphasis added) [hereinafter "Congressional Hearings on U.S. Citizens in Mexico"].

Clearly, the United States views timely consular intervention as an indispensable tool to protect the rights of United States citizens detained abroad. Mexico merely seeks the same rigorous compliance with Article 36 in this country as the United States insists upon abroad.

IV. The Avena Judgment Has Binding Force in the Case of Mr. Sanchez-Llamas.

When the United States and Mexico ratified the Vienna Convention on Consular Relations and its Optional Protocol, they exchanged solemn promises to abide by the terms of those instruments. The binding character of the commitment the United States made in the Optional Protocol is reinforced by the United Nations Charter, also ratified by

both the United States and Mexico. U.N. Charter, *opened for signature* Jun. 26, 1945, 59 Stat. 1031, T.S. No. 993. By ratifying Article 94(1) of the Charter, the United States expressly agreed to "comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter, art. 94, para. 1. And by ratifying Article 59 of the Statute of the International Court of Justice, which forms part of the Charter, the United States expressly agreed that judgments of the Court have "binding force" upon it in cases to which it is a party. Statute of the International Court of Justice, art. 59, 59 Stat. 1055, T.S. 993.

A. The ICJ's Judgment Applies to All Mexican Nationals Facing Severe Penalties or Prolonged Incarceration.

The Government of Mexico had four objectives when it initiated proceedings against the United States at the ICJ.[10] First, Mexico sought the Court's review of over fifty cases of Mexican nationals sentenced to death in the United States, all of whom had been deprived of their rights to consular notification. It did so not out of any sense that remedies for Article 36 violations are confined to capital cases but rather, in the words of the current ICJ President, because such violations are of "particular significance in a case where a sentence of death is imposed, which is not only a punishment

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[10] *See Application Instituting Proceedings (Mex. v. U.S.)*, I.C.J. General List No. 128 (9 January 2003) ("Application"). All of the documents from the *Avena* proceedings cited herein are available on the website of the International Court of Justice, *at* http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

of a severe nature, but also one of an irreversible nature."[11]

Second, Mexico initiated proceedings in order to resolve its dispute with the United States over the interpretation and application of Article 36, including the precise meaning of the obligation of the detaining authority to provide consular information and notification "without delay." Third, Mexico sought "to establish definitively its rights and those of its nationals under Article 36 of the Vienna Convention, as authoritatively interpreted by this Court in *LaGrand*." Application, *supra*, at ¶ 5. And finally, Mexico requested that the ICJ "adjudge and declare" that the United States must comply with its Article 36 obligations in "any future detention of or criminal proceedings against the fifty-four Mexican nationals on death row and any other Mexican national in its territory." *Avena* ¶¶ 12(5), 13(4). In other words, Mexico sought – and obtained – a binding determination of the remedies that must be applied in *all* cases of its nationals whose Article 36 rights were violated in the United States and who were "convicted and sentenced to severe penalties." *Id.* ¶¶ 18-19.

The United States's responses to Mexico's claims reflect its understanding that the ICJ's judgment would extend to other Mexican nationals apart from those on death row. In its first oral presentation to the *Avena* Court, the United States acknowledged that "under *LaGrand*, in cases of violations of Article 36 and the imposition of *severe sentences, including the death penalty*, the remedy is review

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[11] *LaGrand* (*F.R.G. v. U.S*), 2001 I.C.J. 466 (June 27) ("*LaGrand*"), Separate opinion of Vice-President Shi, at para. 17, http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_toc.htm.

and reconsideration of the conviction and sentence in light of the violation."[12] In its written submissions, the United States correctly noted that Mexico's request for remedies "would have the Court require the United States to take specific acts in its municipal criminal justice systems with respect to the cases of fifty-four alleged Mexican nationals and other unnamed Mexican nationals"[13] and that it is "the criminal law and processes of these fifty [U.S.] states, then, that would ultimately have to accommodate any ruling by this Court."[14]

The ICJ's final judgment reflects the parties' consensus on this point. While the ICJ's assessment of the scope of the asserted Article 36 violations was necessarily confined to the facts of the individual cases under review, its determination of the remedies required to cure all such violations was expressed in universal terms:

> To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention . . . .

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[12] *Case Concerning Avena and Other Mexican Nationals*, Verbatim Record of 21 January 2003, at 3.9 (Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, U.S. Department of State) (emphasis added).

[13] 1 Counter-Memorial of the United States of America (Mex. v. U.S.), 2003 I.C.J. Pleadings (*Avena and Other Mexican Nationals*) 40 (Nov. 3, 2003).

[14] *Id.* at 214.

> In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

Avena ¶ 151.

To eliminate any doubt that the Court's Judgment would apply to future cases of Mexican nationals sentenced to "severe penalties," the Court unanimously declared that:

> should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 *(b)*, of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention . . . .

Id. ¶ 153(11). The *Avena* Judgment does not define what constitutes a "severe penalty" that would trigger the right to judicial review and reconsideration. However, the Court's own language and actions establish that this remedy must be applied to a varied set of circumstances, one that includes but is surely not confined to death sentences. For example, the death sentences of three of the named individuals were commuted during the course of the *Avena* litigation, yet the ICJ nevertheless ordered an identical review and reconsideration of their convictions and sentences.[15]

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[15] *Avena* ¶ 106 (1) (referring to the cases of Juan Caballero, Mario Flores, and Gabriel Solache); 106 (3) (referring to the cases of Juan Caballero and Mario Flores); 153(9) (ordering review and

In light of the express terms of the ICJ's Judgment, there can be no doubt that the judicial remedy mandated by the *Avena* Court applies to the case of Mr. Sanchez Llamas, who has been sentenced to serve more than twenty years in prison.[16]

B. The ICJ Has Determined That Article 36 Confers Individual, Justiciable Rights on Detained Foreign Nationals

In both *LaGrand* and *Avena*, the ICJ confirmed that Article 36 confers individual, justiciable rights on detained foreign nationals. In *LaGrand,* after analyzing the scope and purpose of Article 36, and the repeated references to individual rights in its text, the Court held that "the clarity of these provisions, viewed in their context, admits of no doubt."[17] And in *Avena,* the ICJ reaffirmed that "the

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reconsideration of those cases). As a result of the commutation orders, two of these nationals received life sentences, but one received a sentence of forty years. Anne Sweeney, *Sentences of 3 Cut to 40 Years*, CHICAGO SUN-TIMES (Jan. 12, 2003), at 6.

[16] Under the penal codes of some parties to the VCCR, a prison term of more than 20 years would equal or exceed the maximum sentence applied in law or practice. *See, e.g.*, General Civil Penal Code of Norway (amended 1 July 1994), § 17 (b) (imprisonment may only be imposed "for a term not exceeding 21 years"); Richard Bernstein, *Germany Frees Hijacker Who Killed U.S. Sailor,* N.Y. TIMES, Dec. 21, 2005, at A12 (noting that in 1989, maximum sentence for murder allowable under German law was 25 years).

[17] *LaGrand* (*F.R.G. v. U.S*), 2001 I.C.J. 466 (June 27), ¶ 77 (finding that Article 36 confers rights on individual foreign detainees, as well as on their home governments).

individual rights of Mexican nationals under subparagraph 1 *(b)* of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States." *Avena* ¶ 40.

While the ICJ's construction of Article 36 is both authoritative and legally binding, it is by no means the only proof that the treaty provision confers privately enforceable rights. Sixty-three parties to the VCCR have endorsed the ICJ's interpretation in briefs submitted to this Court,[18] and the United Nations General Assembly has repeatedly affirmed the importance of the individual consular rights conferred under Article 36 as a due process safeguard.[19]

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[18] See Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005), (statement by forty- nine European nations that Article 36 confers legally-enforceable rights on individuals); Brief of Foreign Sovereigns as Amici Curiae in Support of Petitioner Jose Ernesto Medellin, 125 S. Ct. 2088 (2005) (statement by thirteen Latin American nations, not including Mexico, that U.S. courts should furnish remedies for Article 36 violations). In a case pre-dating *LaGrand* and *Avena*, the Government of Canada likewise supported the view that individuals had judicially enforceable rights under Article 36(2). *See* Brief Amicus Curiae of the Government of Canada in Support of Petition for Writ of Certiorari, *Faulder v. Johnson* (No. 98-7001) (1998) at 1, 4 (arguing that "dismissal of Mr. Faulder's Vienna Convention claim on local procedural grounds violates the express provisions of article 36(2)").

[19] Resolutions recognizing individual consular rights within the framework of due process guarantees have been endorsed by consensus in every session of the U.N. General Assembly since 2000. *See, e.g.*, *Protection of Migrants*, G.A. Res. 54/166, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/166 (2000); G.A. Res. 55/92, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/92 (2001); G.A. Res. 56/170, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/170 (2002); G.A. Res. 571218, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/218 (2003), *all available at* http://www.un.org/Depts/dhl/resguide/gares1.htm. On 18 March 2005,

Similarly, the United States has repeatedly contended that its nationals have individual or inherent rights to consular access. At congressional hearings held in 1975 regarding United States citizens incarcerated in Mexico, a State Department official testified that "[a]ll of us regard consular protection as an *inherent right of every citizen.*" Congressional Hearings on U.S. Citizens in Mexico, Part I, at 16 (emphasis added). Later in those same hearings, a State Department official emphasized the need to actively intervene in individual cases to protect those individual rights:

> [W]e are persuaded that to make progress in protecting *the rights of U.S. citizens in Mexico*, we must repeatedly present Mexican authorities with the facts, demonstrate how they constitute a violation of Mexican and/or international law and norms, and insist that such violations be corrected and prevented in the future.

Id. at 63 (emphasis added). And in a case brought before the ICJ on behalf of United States nationals held hostage in the American Embassy in Tehran, the United States argued that Article 36 "*establishes rights . . . for the nationals of the sending State* who are assured access to consular officers and through them to others." *See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)* 1980 I.C.J. Pleadings at 174 (emphasis added).

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the General Assembly took note of the *Avena* Judgment and recalled "the obligations of States reaffirmed therein" in its annual resolution on the protection of migrants. *See* G.A. 59/194, U.N. GAOR, 59th Sess., U.N. Doc. A/RES/59/194 < http://www.un.org/Depts/dhl/resguide/r59.htm>.

In recent years, in response to litigation by detained foreign nationals, the State Department has adopted a different interpretation of Article 36. Mexico respectfully suggests that the current view of the State Department is at odds with the plain text of the treaty and, in any event, is no longer sustainable in light of *Avena*.

C. When Article 36 Violations Are Raised in Pretrial Proceedings, Suppression Should Be an Available Remedy.

The ICJ first confronted the question of remedies for Article 36 violations in its *LaGrand* Judgment, where it addressed the application of the procedural default rule in the cases of two German nationals executed by the state of Arizona. While noting that the procedural default rule itself did not violate the Vienna Convention, the Court concluded that its application in the cases of the LaGrand brothers had effectively prevented United States courts "from attaching any legal significance" to the violation of Article 36(1). *LaGrand* ¶ 91. While the courts had addressed the LaGrands' legal claims "by reference to United States constitutional standards," that review was insufficient to satisfy the United States's obligations under Article 36(2). *Id.*

The ICJ also addressed the question of reparation in response to Germany's request for effective remedies in future capital murder prosecutions of German nationals whose Article 36 rights were violated. The United States had consistently argued that no legal remedies would be required in such cases, and that the only reparation available for breaches of the Vienna Convention was a diplomatic

apology. *See id.* ¶ 123. The ICJ, however, held that if the United States "should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice" in cases involving prolonged detention or severe penalties. *Id.* ¶ 125. In such cases, the Court held, the United States would be required to allow "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." *Id.*

One of the central disputes between the parties in *Avena* involved the interpretation of *LaGrand*'s requirement of "review and reconsideration." The United States contended that "review and reconsideration" could be conducted by clemency authorities. *Avena* ¶ 136. Mexico, by contrast, argued that "review and reconsideration" should be conducted by the judiciary, in proceedings that were both transparent and subject to judicial oversight. *Id.* ¶ 135. In addition, Mexico requested "that the convictions and sentences of the 52 Mexican nationals be annulled, and that, in any future criminal proceedings against these 52 Mexican nationals, evidence obtained in breach of Article 36 of the Vienna Convention be excluded." *Id.* ¶ 117.

In response to the parties' submissions, the ICJ determined that review and reconsideration should be conducted by the United States courts. *Id.* ¶¶ 127, 140-41. In addition, the Court established guidelines for that review. First, review and reconsideration must be of both the conviction and sentence. *Id.* ¶ 153(9). Second, the review must be "effective" and must "guarantee that the violation and the possible prejudice caused by that violation be *fully examined and taken into account* in the review and reconsideration process. *Id.* ¶ 138 (emphasis added). And

finally, the courts cannot tether their review of a Vienna Convention violation to the United States Constitution. *Id.* ¶ 139. In other words, the courts cannot reject an Article 36 claim by concluding that the defendant received his due process rights under United States law. Rather, the courts must give full and independent weight to the Article 36 violation and its consequences in each case to ascertain whether the violation "caused actual prejudice to the defendant in the process of the administration of criminal justice." *Id.* ¶¶ 121, 139.

Because the legal consequences of the treaty violation depend on the facts of each case, the ICJ did not accept Mexico's request for automatic annulment of the fifty-two nationals' convictions and death sentences. At the same time, the Court recognized that such remedies could be the ultimate result of the review and reconsideration process in some cases. *Id.* ¶ 123 ("It is not to be presumed, as Mexico asserts, that partial or total annulment of conviction or sentence provides *the necessary and sole remedy*.") (emphasis added). Similarly, the Court found it unnecessary to examine Mexico's contention that the exclusionary rule was a "general principle of law" under the Court's Statute. Observing that the exclusionary rule "relates to the question of what legal consequences flow" from the breach of Article 36 obligations, the Court concluded that the United States courts should examine the appropriateness of suppression "under the concrete circumstances of each case . . . in the process of their review and reconsideration." *Id.* ¶ 127.

If there is one clear principle that emerges from the *Avena* Judgment, it is this: whenever Mexican nationals have been deprived of their consular rights in the United States and are "subjected to prolonged detention or convicted and sentenced to severe penalties, *the legal consequences of*

this breach have to be examined and taken into account" by the United States courts. *Id.* ¶ 140 (emphasis added). This review must take place regardless of the point at which the Vienna Convention violation is eventually discovered. It would make no sense at all to conclude from the ICJ's judgment that Article 36 violations can only be raised on appeal or in post-conviction proceedings – a point with which the United States apparently agrees.

In letters addressed to the Ambassador of Mexico to the United States, the Justice Department has repeatedly declared that, "[c]onsistent with the opinion of the International Court of Justice" in *Avena*, a detained Mexican national is

> free to argue in the trial court that his rights under Article 36 of the Vienna Convention were violated by a failure to inform him of his right to contact his consulate once it was realized that he was a foreign national or there were grounds to think that he was probably a foreign national and to argue that prejudice resulted from the alleged Vienna Convention violation.

Letter of John Ashcroft, Attorney General for the United States of America, to His Excellency Carlos de Icaza, Ambassador of Mexico to the United States, June 3, 2004.[20]

Of course, it would make no sense to advise Mexico that its nationals are "free to raise" Article 36 violations in

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[20] *See also* Letter of John C. Richter, Acting Attorney General for the United States of America, to His Excellency Carlos de Icaza, Ambassador of Mexico to the United States, July 28, 2005. Both letters are attached in the Appendix.

pre-trial proceedings if the courts are precluded from providing any legal remedies for those violations. *Cf. Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) ("The provisions of the Convention should be implemented before trial when they can be appropriately addressed."). Moreover, a *per se* rule precluding courts from suppressing evidence as a remedy for Vienna Convention violations would violate both the letter and the spirit of the *Avena* Judgment. If courts are prevented from crafting appropriate remedies for Article 36 violations in pre-trial proceedings, they will be unable to attach "legal consequences" to the breach of the Convention. Such a blanket prohibition would therefore violate the United States's obligations under Article 36(2) in precisely the same manner as the application of the procedural default rule did in *LaGrand*.

The ICJ clearly contemplated – and the United States agrees – that as a result of *Avena*, some Mexican nationals could receive new trials or new sentencing proceedings. *See Brief for the United States as Amicus Curiae Supporting Respondent, Medellín v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04-5928), at 47 (in the event that prejudice is found upon review and reconsideration, "a new trial or a new sentencing would be ordered."). It would defy logic to conclude that, while an appellate court has the power to order a new trial to remedy a Vienna Convention violation, it may not suppress evidence under any circumstances.[21] The United States

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[21] Several scholars have also advocated for suppression of statements taken in violation of Article 36. *See, e.g.*, Valerie Epps, "Violations of the Vienna Convention on Consular Relations: Time for Remedies," 11 WILLAMETTE J. INT'L L. & DISPUTE RES. 1 (2004); Frederic L. Kirgis, "Restitution as a Remedy in U.S. Courts for Violations of International Law," 95 AM. J. INT'L L. 341 (2001).

courts should be free to apply a wide range of remedies for Vienna Convention violations – whether those violations are raised pre-trial, on direct appeal, or in post-conviction proceedings. The remedies will vary in each case, depending on the court's evaluation of the harm caused by the violation.

Finally, in their evaluation of harm, the courts should be guided by the principles articulated by the Permanent Court of International Justice in its seminal *Chorzów Factory* decision,[22] which was cited with approval by the *Avena* Court:

> What constitutes "reparation in an adequate form" clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury . . . "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."

Avena ¶ 119. Moreover, the courts should be instructed that when assessing Vienna Convention claims presented in pre-trial proceedings, they should refrain from assuming that merely because the defendant was advised of his *Miranda* warnings, he cannot establish harm. Such a facile analysis would run afoul of *Avena,* since it fails to accord full weight to the Article 36 violation on its own terms. Moreover, this view fails to take account of the nature of consular assistance described in Part II, *supra*. *See Rangel-Gonzales*, 617 F.2d at 532-33 (advice provided by Mexican Consulate cannot be

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[22] *Factory at Chorzów,* Merits, 1928, P.C.I.J., Series A, No. 17, p. 47.

equated with administration of *Miranda* warnings by police officer).

The State of Oregon does not dispute that its authorities failed to comply with Article 36 in the case of Mr. Sanchez-Llamas. Nevertheless, the Oregon Supreme Court has failed to provide him with the review and reconsideration mandated by the ICJ, and has determined that it will *never* provide a judicial remedy for an Article 36 violation raised in pre-trial proceedings.[23] That determination violates the United States's international legal obligations under both Article 36(2) and the *Avena* Judgment, and should be rejected by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Oregon should be reversed.

Respectfully submitted,

Sandra L. Babcock
Counsel for *Amicus Curiae*
1516 W. Lake Street, Suite 400
Minneapolis, MN 55408
612) 871-5080

Dated: Minneapolis, MN
December 22, 2005

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[23] Mexico recognizes that the opinion of the Oregon Supreme Court addressed only the remedy of suppression of incriminating statements. There is no question, however, that under this opinion no Oregon court could provide a pre-trial judicial remedy to a Mexican national who demonstrated that his Article 36 rights had been violated.

Office of the Attorney General
Washington, D.C. 20530

June 3, 2004

His Excellency
Carlos de Icaza
Ambassador of Mexico
1911 Pennsylvania Avenue, NW
Washington, DC 20006

Dear Ambassador Icaza:

Thank you for your letter of March 10, 2004, in which you advised of Mexico's opposition to the death penalty generally and requested that the United States not seek the death penalty in the case of Mexican national Alejandrino Guerrero, who is awaiting federal prosecution in North Dakota for his alleged role as the leader of a drug distribution network.

The decision whether to seek the death penalty in every death penalty eligible federal case is made in accordance with the provisions of the United States Attorneys' Manual, chapter 9-10, a copy of which is attached. Although the decision ultimately is mine, as Attorney General, it is made only after extensive review by the United States Attorney for the charging district, in this case the District of North Dakota, and the Attorney General's Review Committee on Capital Cases at the Department of Justice. Defense counsel for a defendant facing potential capital charges is given the opportunity to present

relevant facts and mitigating evidence to the prosecuting United States Attorney and, if the United States Attorney intends to recommend seeking the death penalty, defense counsel will be afforded an opportunity to present the reasons against seeking the death penalty to the Attorney General's Review Committee on Capital Cases. In making my decision, I have before me all materials submitted as part of the Department of Justice's review process, as well as the recommendations of the United States Attorney and the Review Committee.

The case of Alejandrino Guerrero was submitted in January 2004 to the Department of Justice for consideration by the Review Committee. On April 23, 2004, at the conclusion of the review process, my decision was not to seek the death penalty in Alejandrino Guerrero's case.

You have also expressed your concern that Mr. Guerrero was not informed of his opportunity to consult with consular officials in accordance with the Vienna Convention on Consular Relations. Mr. Guerrero's defense counsel has been instructed to inform Mr. Guerrero of his right to consult with the Mexican consular officials, in the event that Mr. Guerrero was not previously so informed. In addition, Mr. Guerrero's case has not yet proceeded to trial. Consistent with the opinion of the International Court of Justice in *Mexico v. United States of America* (Case Concerning Avena and other Mexican Nationals), Mr. Guerrero is free to argue in the trial court that his rights under Article 36 of the Vienna Convention were violated by a failure to inform him of his right to contact his consulate once it was realized that he was a foreign national or there were grounds to think that he was probably a foreign national and to argue that prejudice resulted from the alleged

Vienna Convention violation.

Sincerely,

John Ashcroft
Attorney General

Enclosure

U.S. Department of Justice
Criminal Division
Washington, D.C. 20530
Acting Assistant Attorney General

July 28, 2005

His Excellency Carlos de Icaza
Ambassador
Embajada de Mexico
1911 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Ambassador Icaza:

We received your letter dated February 15, 2005, informing the Attorney General of Mexico's opposition to the death penalty generally and requesting that the United States not seek the death penalty in the case of Mexican national Ivan Mendoza-Rico, who is awaiting federal prosecution in Idaho for his alleged role in a drug trafficking-related murder on September 27, 2004.

The decision whether to seek the death penalty in every death penalty-eligible federal case is made in accordance with the provisions of the United States Attorneys' Manual, chapter 9-10, a copy of which is attached. Although the decision ultimately is the Attorney General's, it is made only after extensive review by the United States Attorney for the charging district, in this case the District of Idaho, and the Attorney General's Review Committee on Capital Cases at the

Department of Justice. Defense counsel for a defendant facing potential capital charges is given the opportunity to present relevant facts and mitigating evidence to the prosecuting United States Attorney and, if the United States Attorney intends to recommend seeking the death penalty, defense counsel will be afforded an opportunity to present the reasons against seeking the death penalty to the Attorney General's Review Committee on Capital Cases. In making his decision, the Attorney General has before him all materials submitted as part of the Department of Justice review process, as well as the recommendations of the United States Attorney and the Review Committee. The case of Ivan Mendoza Rico was submitted in January 2005 to the Department of Justice for consideration by the Review Committee. No decision on that case has been announced.

The standards for determining whether or not the government should seek the death penalty are set forth in the United States Attorneys' Manual as follows:

> In deciding whether it is appropriate to seek the death penalty, the United States Attorney, the Attorney General's Committee and the Attorney General may consider any legitimate law enforcement or prosecutorial reason that weighs for or against seeking the death penalty.
>
> In determining whether or not the Government should seek the death penalty, the United States Attorney, the Attorney General's Committee, and the Attorney General must determine whether the statutory aggravating factors applicable to the offense and any non-statutory aggravating factors sufficiently

outweigh the mitigating factors applicable to the offense to justify a sentence of death, or, in the absence of any mitigating factors, whether the aggravating factors themselves are sufficient to justify a sentence of death. To qualify for consideration in this analysis, an aggravating factor must be provable by admissible evidence beyond a reasonable doubt. Because there may be little or no evidence of mitigating factors available for consideration at the time of this determination, any mitigating factor reasonably raised by the evidence should be deemed established and weighed against the provable aggravating factors. The analysis employed in weighing the aggravating and mitigating actors that are found to exist should be qualitative, not quantitative: a sufficiently strong aggravating factor may outweigh several mitigating factors, and a sufficiently strong mitigating factor may outweigh several aggravating factors. Weak aggravating or mitigating factors may be accorded little or no weight. Finally, there must be substantial admissible and reliable evidence of the aggravating factors.

The authorization process is designed to promote consistency and fairness. As is the case in all other actions taken in the course of Federal prosecutions, bias for or against an individual based upon characteristics such as race or ethnic origin may play no role in the decision whether to seek the death penalty.

USAM 9-10.080. While Mexico's sentiment against the death

penalty is not directly relevant to these established standards, defense counsel for the defendant is free to argue that it provides a basis for exempting him from the death penalty.

The protocol procedures were established to promote consistency and fairness in the federal death penalty authorization process. The protocol reflects a concern that, in all instances, this most serious decision be made on the facts and merits of the case, including relevant aggravating and mitigating evidence, and that the decision to seek the death penalty not be founded on the vagaries of where the crime occurred, local sentiment for or against the death penalty, or any other factor that undermines the goal of consistency and fairness. Because the death penalty-eligible charges against this defendant have been brought before the Department for review, which remains pending, I cannot comment further on the matter.

You have also expressed your concern that Mr. Mendoza-Rico was not informed of his opportunity to consult with consular officials in accordance with the Vienna Convention on Consular Relations. I have been informed by the U.S. Attorney for the District of Idaho that on October 1, 2004, Brian Nyland of the Department of Homeland Security informed the defendant of his right to consult with consular officials. In addition, Mr. Mendoza-Rico's case has not yet proceeded to trial. Consistent with the opinion of the International Court of Justice in *Mexico v. United States of America (Case Concerning Avena and other Mexican Nationals)*, Mr. Mendoza-Rico is free to argue in the trial court that his rights under Article 36 of the Vienna Convention were violated by a failure to inform him of his right to contact his

consulate once it was realized that he was a foreign national or there were grounds to think that he was probably a foreign national and to argue that prejudice resulted from the alleged Vienna Convention violation.

Sincerely,

John C. Richter
Acting Assistant Attorney General

Enclosure

Supreme Court, U.S.
FILED
DEC 22 2005
OFFICE OF THE CLERK

Nos. 04-10566 and 05-51

IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON,
Director of the Virginia Department of Corrections,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF OREGON AND VIRGINIA

BRIEF OF INTERNATIONAL COURT OF JUSTICE EXPERTS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Amici are professors and scholars of law expert in the fields of international law, international dispute settlement, and the application of international law by courts in the United States.[1] (A List of *Amici* is set forth in the Appendix.) *Amici* are experienced in the work of international tribunals, notably the International Court of Justice (ICJ), and include former officials of the U.S. Department of State who have represented the United States at the ICJ. *Amici* seek to present their views concerning the significance of final judgments of the ICJ interpreting a treaty of the United States in proceedings in which the United States participated fully, and the respect that should be accorded to the ICJ's treaty interpretation by all courts in the United States, in the context of petitions for review and reconsideration of convictions of serious crimes (such as murder) entailing severe penalties.

Amici limit their submission to issues of the ICJ's interpretation of the treaty and rights that individuals may assert under it in domestic courts; they do not address the factual basis for petitioners' claims. *Amici* are united in the view that ICJ judgments interpreting the treaty, rendered in cases to which the United States was party, supply the basis for rules of decision for courts in the United States to which claims under the treaty may be presented; that state courts are required to apply the treaty as interpreted by the ICJ; that state procedural default rules cannot foreclose the exercise of treaty rights to a hearing as held by the ICJ; and that petitioners have the right to present their treaty-based claims before the courts of Oregon and Virginia.

SUMMARY OF ARGUMENT

These consolidated petitions present questions concerning the remedies to be accorded by state courts for violations of the Vienna Convention on Consular Relations, in light of authoritative rulings by the International Court of Justice on the meaning of the Convention and how the United States is

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[1] No party other than *Amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this *amicus curiae* brief are on file with the Clerk of the Court.

required to apply it. This Court's disposition in *Medellin v. Dretke*, 125 S.Ct. 2088 (2005), left undecided the underlying issue of the reception into the U.S. legal system of the ICJ's decisions interpreting the treaty.

The Oregon and Virginia courts denied any remedy to either petitioner, on the basis of erroneous views that the treaty does not create individual rights enforceable in a domestic judicial proceeding and that state procedural rules can foreclose a well-founded treaty claim. In part, the error of the courts below was based on what they understood to be the import of *Breard v. Greene*, 523 U.S. 371 (1998), which in turn was based on assumptions that had not had the benefit of plenary briefing, at a time when the ICJ had not yet ruled on questions of treaty interpretation that were properly presented to it. Subsequent to *Breard*, the ICJ has clarified the nature of the rights invocable under the treaty, the treaty-based requirement of a judicial remedy for their violation, and the proper relationship between the rights guaranteed by the treaty and the procedural framework for their exercise under local law. This Court should now revisit its *Breard* conclusions and instruct the lower courts to allow petitioners to present their treaty claims to the appropriate judicial bodies, free of any misconceptions about the treaty-based rights and remedies at issue and of the procedural obstacles that the ICJ has determined to constitute impediments to the exercise of treaty rights.

The ICJ's *LaGrand* and *Avena* decisions constitute the authoritative interpretation of the Vienna Convention as regards nationals of treaty parties who have been sentenced to severe penalties without having been informed of their treaty rights. The rights in question derive from the treaty itself; *LaGrand* and *Avena* clarify the nature and content of those rights and the treaty-based remedies for their enforcement. (Section I.)

LaGrand and *Avena* resulted from a treaty-based dispute settlement process to which the United States fully consented, in which the United States fully participated, and which produced an interpretation of the Vienna Convention that removes any doubt about the obligations of the United States

as a whole toward nationals of treaty parties. The Vienna Convention as interpreted in *LaGrand* and *Avena* binds state authorities; the treaty obligations in question are directed to procedural matters addressed in the ordinary course by domestic courts; and state courts are required by the Supremacy Clause of the Constitution to exercise their judicial powers within their respective jurisdictions to carry out these obligations of the United States. (Section II.)

This Court should endorse as the federal rule of decision the interpretation of the treaty that has now been twice confirmed by the ICJ in cases to which the United States was a party. There is no basis for state courts to continue to follow an Executive Branch litigation position that has been displaced by the appropriate international dispute settlement process to which the United States committed itself in a constitutionally proper way. (Section III.)

The Vienna Convention as interpreted in *LaGrand* and *Avena* does not require Oregon or Virginia to set petitioners free or to refrain from carrying out their sentences, if the courts below were to find after a hearing that the treaty violations had not affected petitioners' ability to defend themselves. What the Convention requires is a judicial forum in which petitioners can have a hearing on their claims that they suffered actual prejudice from the treaty violations – violations neither Oregon nor Virginia has denied. This Court should therefore remand for hearings in which petitioners' treaty claims could be examined on their merits. In the case of petitioner Sanchez-Llamas, the Oregon courts should reexamine his case, informed by the *LaGrand* and *Avena* interpretation that the treaty establishes judicially enforceable individual rights. In the case of petitioner Bustillo, the Virginia courts should remove the barrier of the state procedural default rule, which was applied in a way that the ICJ has found to be inconsistent with treaty rights.

ARGUMENT

I. The ICJ Has Authoritatively Determined The Interpretation And Application Of The Vienna Convention For Purposes Of The Questions Presented In These Petitions.

The courts below based their denials of relief on incorrect assumptions about the interpretation of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 [Vienna Convention] and its application as a controlling source of law for state courts. The Oregon court in No. 04-10566 adopted the position that the Vienna Convention does not confer individual rights enforceable in judicial proceedings; the Virginia court in No. 05-51 held that a state procedural default rule could be applied to foreclose a Vienna Convention claim. These positions have now been definitively rejected by the International Court of Justice [ICJ].[2] Since petitioners are covered by the Vienna Convention (Section I.A), they are entitled to benefit from the ICJ's construction concerning judicially enforceable individual rights (Section I.B) and procedural default (Section I.C), and are entitled to the same treaty-based remedy as the ICJ held to be required for the individuals covered by *LaGrand* and *Avena* (Section I.D).

A. Petitioners Are Foreign Nationals Covered By The Vienna Convention Whose Rights Under The Convention Were Violated.

Petitioners are foreign nationals from states parties to the Vienna Convention, which provides in Article 36(1)(b) that if such a national is arrested or detained, he shall be informed

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[2] No decision of this Court should have been understood as standing in the way of full implementation of the ICJ's authoritative interpretation. *Breard v. Greene*, 523 U.S. 371 (1998), left open the possibility that the Vienna Convention entails judicially enforceable individual rights, *see* 523 U.S. at 376 (treaty "arguably confers on an individual the right to consular assistance following arrest"), but concluded that such rights, if they exist, could be cut off by a later-in-time federal statute, which is not involved here. In *Medellin v. Dretke*, 125 S.Ct. 2088, 2091 n. 3 (2005), this Court noted that the ICJ had held in *Avena* that the Vienna Convention does establish individually enforceable rights. *Breard* did not address the situation of state rather than federal procedural default rules, an issue now pending in Texas in the *Medellin* matter.

"without delay of his rights" to have his consular post notified and to communicate with the consulate. The obligations of parties to the Vienna Convention have been interpreted several times in cases involving the United States brought under the Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325. T.I.A.S. No. 6820, 596 U.N.T.S. 487 [Optional Protocol], including in *LaGrand* (F.R.G. v. U.S.), 2001 ICJ 466, and *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 ICJ No. 128. *LaGrand* held that the Vienna Convention does establish rights for individuals, that procedural default rules must not be applied to prevent the exercise of treaty rights, and that the remedy for violations of Article 36 consists in the obligation of the United States to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of affected individuals. *Avena* confirmed these conclusions and further specified that the remedy of review and reconsideration is to be carried out in judicial proceedings. (Sections I.B, I.C.) *LaGrand* and *Avena* likewise held that the requirement of review and reconsideration applies as a matter of interpretation of the Vienna Convention not only in the cases of the individuals named in the judgments, but also in other cases under the treaty entailing "severe penalties." (Section I.D.)

Petitioner in No. 04-10566, Moises Sanchez-Llamas, is a national of Mexico who was convicted in Oregon of 11 felony counts, including attempted murder and assault in the first degree, and sentenced to 246 months' imprisonment – undoubtedly "severe penalties" under *LaGrand* and *Avena*. He was advised of his *Miranda* rights in Spanish and English but not notified of his right to contact the Mexican consulate before he confessed. Prior to trial, he moved to suppress his confession because of the Vienna Convention violation. The denial of this motion was upheld by the Supreme Court of Oregon on the ground that the Vienna Convention does not provide for judicially enforceable individual rights. *Oregon v. Sanchez-Llamas*, 338 Ore. 267, 108 P.3d 573 (2005). This position is inconsistent with the ICJ's decision in *Avena* that the Vienna Convention does establish individual rights and that the

proper remedy under the treaty for violation of those rights is to be determined in a judicial hearing. (Section I.B.)

Petitioner in No. 05-51, Mario A. Bustillo, is a national of Honduras – a country which, like Mexico, is party to the Vienna Convention. He was convicted of murder and sentenced to 30 years' imprisonment – unquestionably "severe penalties" – without awareness of his consular rights. He claims that the crime was actually committed by another Honduran national who fled to Honduras, and he has introduced a declaration from the Honduran consulate to the effect that it would have been able to help him identify that individual and obtain potentially exculpatory evidence if he had had consular access prior to trial. The Virginia courts denied relief on the ground of procedural default, because he had not raised his Vienna Convention claim at trial. App. to Pet. for Certiorari, pp. 20a, 40a, 44a, 47a. This denial is inconsistent with the ICJ's holding that procedural default rules (while not invalid *per se*) must not be applied to foreclose a judicial hearing on a claim that failure to inform a defendant of his treaty rights had prevented him from asserting them and that he had suffered prejudice from that failure. (Section I.C.)

B. The *LaGrand* And *Avena* Judgments Establish That The Vienna Convention Confers Individual Rights To Be Enforced In Domestic Judicial Proceedings.

In *LaGrand* (paras. 75-77), the ICJ laid to rest all debate about the nature of the Vienna Convention rights in question as rights of the individual concerned. The ICJ specifically rejected the U.S. contention (para. 76) that the rights at issue are rights of states and not of individuals, concluding (based on the text of the provisions in context) "that Article 36, paragraph 1, creates individual rights."[3] In *Avena*, the ICJ reaffirmed its *LaGrand* conclusion on individual rights and additionally observed (para. 40) "that the individual rights of Mexican nationals under [Article 36(1)(*b*)] are rights which are to be asserted, at any rate in the first place, within the

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[3] *LaGrand*, para. 77; *see also* paras. 38, 42, 74, 78, 126, and *Avena*, paras. 35, 40, 124, 139-140 (on the contentions of Germany and the United States concerning individual rights).

domestic legal system of the United States."[4] The ICJ explained that these "are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law" (para. 140), thereby recognizing that an individual's treaty right to consular assistance is analytically and practically different from constitutional rights.[5]

Avena specified further that a judicial hearing is required to redress violations of these treaty-based individual rights. The ICJ expressly rejected the U.S. contention that nonjudicial remedies such as clemency could satisfy treaty requirements and explained the need for a judicial remedy within the individual's own criminal proceedings as an interpretation of Article 36.[6] This aspect of *Avena* crucially locates the remedial dimension *as a matter of interpretation and application of the Vienna Convention itself.* As the United States has stated in the past (referring to ICJ treaty cases), the question of remedy for a treaty violation is itself a question of treaty law:

> The Court's jurisprudence establishes that "the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation

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[4] This observation responded to the U.S. position that Mexico's ICJ application should be considered inadmissible as to any Mexican national who had not exhausted all remedies in U.S. courts. The U.S. assertion before the ICJ that there might be remedies remaining to be exhausted in the U.S. legal system was in tension with the U.S. position at the ICJ – and in U.S. domestic courts – that the treaty did not create judicially enforceable rights. The ICJ has rejected this position as a matter of treaty interpretation, and this Court should reject it as well. *See* Section III.

[5] Petitioner Bustillo's case is an apt illustration of this proposition. Consular services from the government of Honduras could have helped him obtain immigration records and other official documents concerning another Honduran national – assistance beyond the power of his own counsel or any U.S. state or federal authority to provide.

[6] *See Avena*, paras. 121 (remedy for Article 36 violation to be carried out "by the United States courts"), 122 (question of prejudice "is an integral part of criminal proceedings before the courts of the United States"), 127 (legal consequences of breach "to be examined under the concrete circumstances of each case by the United States courts concerned"), 140 ("it is the judicial process that is suited to this task"), 141 (review and reconsideration "should occur within the overall judicial proceedings relating to the individual defendant concerned").

> therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself." (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21; see also *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 184.)

Memorial of the Government of the United States of America, *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran),1979 ICJ Pleadings 121 at 188.

C. The ICJ Has Held That Applications Of The Procedural Default Rule To Prevent Adjudication Of Whether An Individual Has Been Prejudiced By A Treaty Violation Are Incompatible With The Treaty.

In both *LaGrand* and *Avena*, the ICJ addressed in detail the U.S. position that procedural default rules could foreclose presentation of treaty claims and gave a reasoned explanation for not accepting that position.[7] The ICJ concluded that while the procedural default rule in itself does not violate Article 36, particular applications of the rule can violate the Convention, namely when a breach of Article 36(1) through failure to inform the individual of his rights precluded the exercise of his or his country's treaty rights.

As with the ICJ's treatment of the question of judicial remedy (Section I.B), the issue of application of the procedural default rule is itself a question of treaty law – specifically of interpretation and application of Article 36(2) of the Vienna Convention, which provides that the domestic framework for exercise of treaty rights "must enable full effect to be given to the purposes for which the rights accorded under [Article 36] are intended." In *Breard*, this Court assumed that the mention in Article 36(2) of "the laws and regulations of the receiving State" validated the operation of rules of procedural default in U.S. habeas jurisprudence, but that assumption was made

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[7] *See LaGrand*, paras. 50, 58-60, 79-91, 125, 128(7); *Avena*, paras. 111-113, 133-134, 138. In *Avena*, the treatment of procedural default and related questions comes under the general heading of "Article 36, paragraph 2," beginning at para. 107 of the judgment.

without benefit of full briefing on whether such rules "enable full effect to be given" to Article 36's purposes. The matter was later considered in a full adversarial posture in *LaGrand* and *Avena*, and the ICJ's decisions in those cases have undercut this Court's assumption in *Breard*. As on other occasions when this Court has had drawn to its attention materials relevant to the proper international interpretation of a treaty, it would be appropriate for this Court to reconsider and revise its previous conclusions with attention to the ICJ's treatment.[8]

D. The ICJ Has Held That The Remedy Required By The Vienna Convention For Violations Is Review And Reconsideration Of Convictions And Sentences In Circumstances Like Those Of Petitioners, Involving "Severe Penalties."

At the ICJ merits phase of *LaGrand*, review and reconsideration of the convictions and sentences of the particular individuals was impossible, since the LaGrand brothers had been executed. Nonetheless, Germany drew to the ICJ's attention the fact that other German nationals were or could be similarly situated and asked the ICJ to frame its judgment with such cases in view. *LaGrand*, paras. 117-125. In that regard, the ICJ reasoned that an apology would not suffice where individuals "have been subjected to prolonged detention or convicted and sentenced to severe penalties" (para. 125) and addressed the remedies for such individuals in the last dispositive paragraph of the judgment.[9] Similarly, in *Avena*, Mexico made the ICJ aware that beyond the specific

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[8] *Cf. United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (revisiting treaty question decided in *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), after receiving translated Spanish text). In light of the ICJ's view of U.S. treaty obligations, a *Charming Betsy* analysis of the later-in-time federal statute (not involved in the present cases) might be appropriate if the statute involved in *Breard* reaches this Court again.

[9] *LaGrand*, para. 128(7) (adopted 14-1):

> *Finds* that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1(*b*) of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.

individuals on whose behalf it brought the case, treaty violations continued to occur and other Mexican nationals whose rights had been violated were at various stages of criminal proceedings; Mexico therefore asked for the judgment to protect those and any future Mexican nationals in comparable situations. *See Avena*, para. 146 (referring to at least 100 cases in first half of 2003 in which Mexican nationals had been arrested for serious felonies without timely notice of their consular rights). The ICJ addressed Mexico's request in the last dispositive provision of the judgment,[10] and by a paragraph in its reasoning explaining the obligations of the United States flowing from the treaty itself and applying to all nationals of treaty parties:[11]

> 151. The Court would now re-emphasize a point of importance. In the present case, it has had occasion to examine the obligations of the United States under Article 36 of the Vienna Convention in relation to Mexican nationals sentenced to death in the United States. Its findings as to the duty of review and reconsideration of convictions and sentences have been directed to the circumstance of severe penalties being imposed on foreign nationals who happen to be of Mexican nationality. To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing

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[10] *Avena*, para. 153 (11) (adopted unanimously):

> *Finds* that, *should Mexican nationals nonetheless be sentenced to severe penalties*, without their rights under Article 36, paragraph 1(*b*), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment. [Emphasis added.]

[11] To similar effect, see Declaration of President Guillaume in *LaGrand*, 2001 ICJ at 517 ("in order to avoid any ambiguity, it should be made clear that there can be no question of applying an *a contrario* interpretation to this paragraph."). On the import of *LaGrand* and *Avena* for nationals of states other than Germany and Mexico, see Section III.A.

> the *issues of principle* raised in the course of the present proceedings *from the viewpoint of the general application of the Vienna Convention*, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to *other foreign nationals* finding themselves in similar situations in the United States. [Emphasis added.]

Petitioner Sanchez-Llamas, as a Mexican national sentenced to severe penalties, is without doubt comprehended within both paragraph 151 and dispositive paragraph 153(11) of *Avena*; petitioner Bustillo is surely one of the similarly situated "other foreign nationals" under the ICJ's authoritative interpretation of the Vienna Convention.

II. *LaGrand* And *Avena* Resulted From A Treaty-Based Dispute Settlement Process To Which The United States Agreed, In Which The United States Participated Fully, And Which Specifies Treaty Obligations For The United States As A Whole.

Amici respectfully emphasize the fully consensual nature of the obligations undertaken by the United States in adhering to the Vienna Convention and Optional Protocol. The Optional Protocol serves as a forum selection clause, with the effect that parties that have selected the ICJ as the forum to decide their disputes are bound to carry out its decisions.[12] Thus, once having given consent to both the Vienna Convention and the designated forum for dispute settlement, the United States is obligated to comply with the Convention, as interpreted by the ICJ.

A. The Vienna Convention Establishes Uniform Consular Standards.

The Vienna Convention codifies into multilateral treaty law a body of rules that evolved over centuries. Before the

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[12] *Cf. Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (enforcing arbitration agreement).

Vienna Convention, disputes over consular relations frequently led to diplomatic protests and international arbitration.[13] By the mid-20th century, the desirability of a multilateral treaty to codify consular law and provide for settlement of consular disputes was clear. Treaty codifications of customary international law produce greater certainty and enjoy a clearer status than custom in many legal systems. A multilateral mechanism for binding settlement of consular disputes would likewise strengthen compliance and obviate the need for special arbitration agreements.

Codification of consular law was undertaken by the U.N. International Law Commission and a diplomatic conference. *See* 1961-II Y.B. INT'L L. COMM'N 88-128. The United States played a leading role in negotiating the specific wording of Article 36 of the Convention and the Optional Protocol. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 41, 59-61 [Report of U.S. Delegation]. The United States actively advocated the provision that became the Optional Protocol and resisted others' efforts to eliminate or weaken dispute settlement. *See* Report of U.S. Delegation at 72-73. The formulation from the Vienna Conference, fully supported by the United States,

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[13] *See* 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 830-837 (1942) [Hackworth]; M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, vol. 7 at 626-658; vol. 8 at 807-837 (1970). In the 1920s, a U.S.-Mexican claims commission held that "a foreigner, not familiar with the laws of the country where he temporarily resides, should be given [the] opportunity" of consular access. *Walter H. Faulkner* (U.S. v. Mex.), Opinions of the Commissioners Under the Convention Concluded September 8, 1923 (1927) at 86, 90; *see also* 4 Hackworth 830. Conversely, where California officials did not give the Mexican consulate access to a detained Mexican citizen, the Department of State stressed the importance of California's compliance with standards maintained by the United States in its dealings with other countries:

> Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if [the] attitude [of the] District Attorney is maintained in [the] instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens.

4 Hackworth 836.

was an Optional Protocol that states would be free to accept or not; upon acceptance, a binding obligation would be created. *Ibid.* The United States voluntarily accepted the Optional Protocol when it ratified the Vienna Convention in 1969.[14]

No state can unilaterally determine the meaning of an international treaty.[15] Thus, in a dispute over the interpretation and application of the Vienna Convention, the United States cannot impose its own view on its treaty partners,[16] or establish the measure of its own treaty compliance. Nor can disputes over the application of the Vienna Convention to particular facts, or over the remedy for breach, be determined by the United States as one party to the dispute.

B. The United States Consented To ICJ Jurisdiction To Decide Disputes Under The Vienna Convention And Is Therefore Required To Give Effect To The Resulting Interpretation Of The Disputed Treaty Provisions.

The United States freely agreed to the compulsory jurisdiction of the ICJ to resolve Vienna Convention disputes, and thus voluntarily accepted an obligation to give effect to the ICJ's interpretation resulting from the dispute settlement procedure. The basis for ICJ compulsory jurisdiction is Article I of the Optional Protocol.[17] The jurisdiction of the ICJ in

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[14] On March 7, 2005, the United States gave notice of withdrawal from the Optional Protocol. (Section II.C.)

[15] *See Jesse Lewis (The David J. Adams) Claim* (U.S. v. Gr. Br., 1921), 6 U.N. Rep. Int'l Arb. Awards 85 (British court decision could not be conclusive of meaning of U.S.-British treaty; arbitral tribunal had competence to interpret the treaty authoritatively). *See also Mitsubishi*, 473 U.S. at 629; *Bremen*, 407 U.S. at 9 (U.S. courts should not "insist on a parochial concept that all disputes must be resolved under our laws and in our courts. ... We cannot have [international dealings] exclusively on our terms, governed by our laws, and resolved in our courts.").

[16] For this reason, U.S. courts ought to give careful consideration to reasoned positions adopted by foreign or international as well as U.S. courts on points of treaty interpretation. *Cf. Olympic Airways v. Husain*, 540 U.S. 644, 660-661 (2004) (Scalia, J., dissenting). Where a tribunal has been accepted by the U.S. political branches as the forum for binding settlement of treaty disputes, deference to its conclusions is not just advisable but required as a matter of treaty law.

[17] Article I states: "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory

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LaGrand and *Avena* was founded on consent and reciprocity under Article 36(1) of the ICJ Statute, which establishes jurisdiction over "all matters specially provided for ... in treaties and conventions in force." At all times relevant to *LaGrand* and *Avena*, the Optional Protocol was a treaty in force under Article 36(1) of the ICJ Statute. Because the United States consented through the proper processes under domestic and international law to submit Vienna Convention disputes to ICJ jurisdiction, it is required to implement the outcome of the procedure.[18]

The United States was the first state to turn to the ICJ in a Vienna Convention dispute, when it brought an application against Iran concerning U.S. diplomatic and consular personnel held hostage in Tehran in 1979. *See United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 1980 ICJ 3, 5, 24-26. The U.S. pleadings in that matter analyze the obligation of parties to the Optional Protocol when disputes arise to abide by ICJ decisions. *See* 1979 ICJ Pleadings, *United States Diplomatic and Consular Staff in Tehran*, at 141-152.[19] When the ICJ indicated provisional measures in 1979 and entered judgment in 1980, the United States insisted on Iranian compliance and invoked the ICJ's decisions in U.S. and foreign tribunals.

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jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

[18] *See* U.N. Charter, 59 Stat. 1031, art. 94 ("Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.").

[19] The availability of the ICJ to the United States in that case differed from the situation prior to the Vienna Convention, when the United States was unable because of the lack of jurisdictional consent to bring disputes over consular access to an authoritative tribunal. In 1954 the United States filed an ICJ case against Hungary claiming denial of consular access to four U.S. airmen who were tried in Hungary after their plane was brought down. 1954 ICJ Pleadings, *Treatment in Hungary of Aircraft and Crew of the United States of America* (U.S. v. Hung.), at 19-20, 31, 35-36. The case was dismissed because Hungary had not consented to ICJ jurisdiction. 1954 ICJ 99. Hungary is now party to the Vienna Convention and the Optional Protocol.

Approximately 70 U.S. treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ.[20] These include bilateral and multilateral treaties involving substantial economic, political, and other interests. The United States is a frequent litigant at the ICJ, both as applicant and as respondent. Indeed, the United States has been involved in more ICJ cases than any other state:[21] in total, the United States has been party to 21 cases at the ICJ,[22] of which 10 have been brought by the United States as applicant or by special agreement and 11 have been brought against the United States.[23] Since each of the 70 treaties with an ICJ dispute settlement clause entails obligations under those treaties and under the U.N. Charter (art. 94) and ICJ Statute (arts. 36(1), 59), failure to carry out *LaGrand* and *Avena* could prejudice the ability of the United States to hold other states to their

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[20] *See* Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice, in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58-81 (Lori F. Damrosch ed., 1987) [CROSSROADS]. To the best of *Amici*'s knowledge, with only three exceptions (see below) all such treaties remain in force for the United States as of 2005, as specified for each such treaty in the Department of State publication, TREATIES IN FORCE. Two treaties with ICJ clauses came into force for the United States after completion of the Morrison study: the Convention on the Physical Protection of Nuclear Materials, T.I.A.S. No. 11080 (in force Feb. 8, 1987), and the International Convention on the Taking of Hostages, T.I.A.S. No. 11081 (in force Jan. 6, 1985).

In 1985 the United States gave notice of termination of jurisdiction under the optional clause of Article 36(2) of the ICJ Statute and of a treaty of friendship with Nicaragua (the bases of jurisdiction on which the ICJ had relied in the *Nicaragua* case, note 25), and in 2005 gave notice of withdrawal from the Optional Protocol under the Vienna Convention. (Section II.C.)

[21] For a listing of all ICJ cases grouped by state, see the ICJ website at www.icj-cij.org.

[22] The United States has also taken part in almost all proceedings for advisory opinions under Article 65 of the ICJ Statute. *See* Goler Teal Butcher, *The Consonance of U.S. Positions with the International Court's Advisory Opinions, in* CROSSROADS at 423; for a current listing, see ICJ Website.

[23] The cases initiated by the United States include seven involving Soviet-bloc aerial incidents, as well as *Tehran Hostages* (Iran 1979-81), *Gulf of Maine* (Canada 1981-84), and *Elettronica Sicula S.p.A. (ELSI)* (Italy 1987-89). *See* pp. 17-18 below.

dispute settlement obligations and to sustain U.S. credibility before the ICJ in future proceedings. While not all of these treaties are self-executing or confer individual rights subject to judicial protection, the Vienna Convention is indeed a treaty contemplating domestic judicial implementation in favor of individuals as confirmed in *Avena*, and this Court should therefore ensure that state courts fulfill those treaty rights in accordance with the ICJ's interpretation.

The United States has a major stake in maintaining a record of abiding by the outcome of ICJ dispute settlement, since it continues to be active in that forum. Compliance with ICJ final judgments has generally been high, including in the cases in which the United States has been a party.[24] States have exceptionally disregarded ICJ rulings when they considered that the ICJ lacked a proper consensual foundation to decide the case, notably where respondents insisted that the ICJ had been granted no competence to decide a matter involving a state's vital security interests.[25] In the Vienna Convention cases, jurisdiction was by consent and no security interest would be prejudiced by compliance. Indeed, President Bush's memorandum on compliance with *Avena* (Section III) confirms the national interest in fulfilling international obligations.

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[24] Recent studies find compliance with two-thirds of the ICJ's substantive judgments and as high as 80% compliance with final judgments over a substantial period. *See* Colter Paulson, *Compliance With Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 456-460 (2004) (compliance rate of 60% with judgments issued in last 15 years; likelihood that rate would go up to 80% rate for prior periods in light of efforts to comply over time); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1308-1311 (2004) (overall compliance rate of 68%, counting disregard of provisional measures as noncompliance); Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court*, *in* CROSSROADS at 288, 310-319 (only 5 cases of noncompliance with final judgments 1946-1986).

[25] See especially the U.S. position on *Military and Paramilitary Activities in and against Nicaragua* (Nic. v. U.S.), 1986 ICJ 14, note 34 below. France denied the existence of proper ICJ jurisdiction in *Nuclear Tests* (Austl. & N.Z. v. Fr.), 1974 ICJ 253, 457. The United States and France reacted to these cases by withdrawing from the general compulsory jurisdiction clause of Article 36(2) of the ICJ Statute, while maintaining treaty-based acceptances under Article 36(1).

Implementation of ICJ judgments has proceeded smoothly in almost all treaty-based cases and those involving the rights of aliens within a state's territory. In the first case leading to a final judgment involving the United States, both the United States and France promptly complied with the judgment in *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 ICJ 176.[26] In *Gulf of Maine* (Canada/U.S.), 1984 ICJ 246, the final judgment drew a maritime boundary; both sides accepted the judgment and promptly complied.[27] In *ELSI*, 1989 ICJ 15, the United States embraced the ICJ forum as part of its diplomacy and accepted the judgment as dispositive of the claims it had raised on behalf of U.S. investors.[28] Thus, apart from *Nicaragua* (addressed in note 34 below) and such continuing problems as may exist in the wake of *LaGrand* and *Avena*, the United States has complied with all final ICJ judgments addressed to it and has benefited from the compliance of all of its adversaries with final judgments

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[26] The final judgment in *Morocco* had elements requiring implementation by each side. The United States dismissed all cases before U.S. consular courts in Morocco that were outside the limits of jurisdiction specified by the ICJ, and French courts relied on the judgment in local (Moroccan) and appellate rulings (by the *Cour de cassation*), which referred to the ICJ judgment as dispositive. *See* Manley O. Hudson, *The Thirty-First Year of the World Court*, 47 AM. J. INT'L L. 1, 8, 14-15 (1953); Note, *Judicial Decisions: Morocco-Criminal Jurisdiction over U.S. Citizens- ... -International Court of Justice*, 49 AM. J. INT'L L. 263, 267 (1955); CHRISTOPH C. SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS 33-34, 199, 221 n. 100 (1981) (French courts "do not seem to have regarded any domestic implementing measures for the application of the International Court's judgment as being necessary;" direct application of decision derived from French submission to ICJ jurisdiction).

[27] Compliance having been assumed, only a few cases refer to the ICJ judgment. *See, e.g., Conde v. Starlight I Inc.*, 103 F.3d 210 (1st Cir. 1997) (Hague Line mentioned); *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1992] 3 F.C. 54 (Can. Fed. Ct.), *rev'd*, [1995] 2 F.C. 467, *aff'd*, [1997] 1 S.C.R. 12 (plaintiff sought fishing license in area awarded to Canada by ICJ); *Mersey Seafoods Ltd. v. Minister of Nat'l Revenue*, [1985] 2 C.T.C. 2485 (Can. Tax Ct.), paras. 142-147 (ICJ decision became available after arguments concluded).

[28] *See* Terry D. Gill, *International Court of Justice - Diplomatic Protection - U.S.-Italian Treaty of Friendship, Commerce and Navigation*, 84 AM. J. INT'L L. 249, 257 (1990).

addressed to them, except for Iran in the *Tehran Hostages* case.[29] In view of the U.S. interest in credible fulfillment of dispute settlement undertakings,[30] this Court should ensure that the

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[29] In addition to the cases discussed in the text, the disposition of the remainder of the 21 cases to which the United States has been party is as follows:

Dismissal on Threshold Ground (No Jurisdiction or Claim Inadmissible): The seven Soviet-bloc *Aerial Incident* cases were dismissed for lack of jurisdiction. 1954 ICJ 99 (U.S. v. Hung.); 1954 ICJ 103 (U.S. v. USSR); 1956 ICJ 6 (U.S. v. Cz.); 1956 ICJ 9 (U.S. v. USSR); 1958 ICJ 158 (U.S. v. USSR); 1959 ICJ 276 (U.S. v. USSR); 1960 ICJ 146 (U.S. v. Bulg.). *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., U.K., U.S.), 1954 ICJ 19, was dismissed for lack of an indispensable party. *Interhandel* (Switz. v. U.S.), 1959 ICJ 16, was dismissed for failure to exhaust local remedies. *Legality of Use of Force* (Yugo. v. U.S.), 1999 ICJ 916, was dismissed for lack of jurisdiction.

Dismissal Upon Settlement: *Aerial Incident of 3 July 1988* (Iran v. U.S.), 1996 ICJ 9, was discontinued after the United States agreed to make an *ex gratia* payment. *Lockerbie (Questions of Interpretation and Application of the 1971 Montreal Convention)* (Libya v. U.S.), 2003 ICJ 152, was discontinued upon an overall settlement. *Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 ICJ 426, was discontinued after provisional measures and before the merits.

Dismissal on Merits: *Oil Platforms* (Iran v. U.S.), 2003 ICJ 161, was dismissed on the merits of both Iran's claim and the U.S. counterclaim.

[30] On rare occasions of U.S. failure to implement obligations resulting from dispute settlement (as with prolonged noncompliance with the *Chamizal* arbitral award in Mexico's favor), detriments to U.S. economic and political interests are well-documented. *See* SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL CONFLICT, 1864-1964 68-69, 75-77, 86-88, 100-101 (1965); ANTONIO GÓMEZ ROBLEDO, MÉXICO Y EL ARBITRAJE INTERNACIONAL 161 (1965); Percy Don Williams, Jr., *Fifty Years of the Chamizal Controversy – A Note on International Arbitral Appeals*, 25 TEX. L. REV. 455, 461-462 (1947) (problems in negotiating with Mexico over expropriation of U.S. properties, in view of noncompliance with *Chamizal* award); FRANCIS J. WEBER, THE UNITED STATES VERSUS MEXICO: THE FINAL SETTLEMENT OF THE PIOUS FUND 42-50 (1969) (linkage between U.S. rejection of *Chamizal* and Mexico's suspension of payments under *Pious Fund* award). President Kennedy said that because of the U.S. refusal on *Chamizal*, "Mexico has been unwilling to take any other matter to arbitration, which has, of course, therefore lessened the harmony between the two countries." *See Kennedy Says U.S. Was Wrong in Mexico Border Disagreement*, N.Y. TIMES, Jul. 6, 1962, at 4, 8.

At the time of the eventual Chamizal settlement in 1963, the office of the Texas Attorney General concurred with the opinion of the Legal Adviser

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courts below uphold the U.S. obligations to carry out the ICJ's treaty interpretation.

This Court has recognized that when the United States undertakes to participate in international dispute settlement, the good faith of the United States is implicated in carrying out the result. *See La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899). In *Dames & Moore v. Regan*, 453 U.S. 654, 679-680 (1981), this Court explained that claims by nationals of one country against another can be "sources of friction" in international relations and that dispute settlement procedures accepted by the U.S. political branches are a traditional and proper method for resolving such grievances. Implementation of *LaGrand* and *Avena* is thus consistent with established jurisprudence in respect of international dispute settlement.

C. Withdrawal From The Optional Protocol Does Not Affect The U.S. Obligation To Abide By The Vienna Convention As Interpreted In *LaGrand* And *Avena*.

On March 7, 2005, the U.S. Secretary of State notified the U.N. Secretary-General that the United States "hereby withdraws" from the Optional Protocol. Under international law, this notice could not affect obligations incurred or judgments rendered while the United States was a party to the Protocol. More important for the present case, at the same time as the announcement of withdrawal from the Protocol, the United States reaffirmed its commitment to the Vienna Convention as well as its decision to comply with the *Avena* judgment.[31] It is therefore essential that domestic courts, including this Court, uphold the Convention correctly and

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of the U.S. Department of State that the matter could be resolved with Mexico by treaty without Texas's consent, because of its international implications. *See* Liss at 95-97; 3 Whiteman at 680, 696-699.

[31] The State Department spokesman said (in response to a question): "[T]he bottom line is we believe in the international system, we are committed participants in the international system, as reflected by our continued commitment to the Vienna Convention and its provisions, as well as our decision to comply with the judgment." Dep't of State Daily Press Briefing (Mar. 10, 2005), *at* http://www.state.gov/r/pa/prs/dpb/2005/43225.htm.

implement it according to the interpretation established before the U.S. withdrawal.

D. The Vienna Convention As Interpreted In *LaGrand* And *Avena* Binds The Courts And Is To Be Implemented Through Judicial Action.

LaGrand and *Avena* clarify treaty obligations of the United States which are the supreme law of the land (U.S. Const. art. VI) and binding on all state courts, and the legal obligations of the United States to abide by the interpretations in those cases likewise arise from binding treaty undertakings. Hence, on the current petitions, the interpretations in *LaGrand* and *Avena* provide the basis for the rule of decision which this Court should instruct state courts to follow.

The Senate approved the obligations of the Vienna Convention and ICJ compulsory jurisdiction over disputes under it when it gave unanimous advice and consent to ratification of the Vienna Convention and the Optional Protocol. *See* 115 Cong. Rec. 30997 (Oct. 22, 1969).[32] The Vienna Convention has been understood at all times to be a self-executing treaty.[33] Likewise, there has never been the slightest doubt that the Vienna Convention would prevail over any inconsistent state law. The priority of treaty law over state law as required by the Supremacy Clause was spelled out explicitly in the State Department's responses to the Senate's questions:

> *Question. What is the effect of the convention on (a) Federal legislation; and (b) State laws?*
>
> Answer [after explaining a possible area of conflict not relevant here].
>
> To the extent that there are conflicts with Federal legislation or State laws the Vienna

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[32] *See* RESTATEMENT (Third) of the Foreign Relations Law of the United States (1987), Intro. Note to Part III and §§ 301-312, 321; Intro. Note to Part IV, ch. 6 (before § 464); § 465.

[33] The Department of State witness informed the Senate: "The Convention is considered entirely self-executive and does not require any implementing or complementing legislation." Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State, Before the Senate Committee on Foreign Relations, reprinted in Sen. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. (1969), at 5. *See also* RESTATEMENT, Intro. Note before § 464.

> Convention, after ratification, would govern as in the case of bilateral consular conventions.

Sen. Exec. Rep. No. 91-9, at 18. This official response about the controlling effect of the Vienna Convention raised no concerns in the Senate, which gave unanimous advice and consent.

Because *LaGrand* and *Avena* specify what is required by the Vienna Convention itself as a remedy for breaches, all aspects of the present petitions are properly understood as implementation of self-executing treaty obligations.[34] Just as no legislation was required to implement the treaty obligation to inform foreign nationals of their consular rights, no further action from the federal political branches is needed to afford petitioners the treaty-based judicial hearing that the ICJ has found to be necessary to redress violations of this right.[35] *LaGrand* and *Avena* clarify obligations that existed when petitioners were arrested (the obligation to inform them of their treaty rights) and subsequently when they were tried, convicted, and sentenced (the treaty-based obligation to review the effect of the violation of the duty to inform and to accord an effective remedy). The procedure prescribed is well within

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[34] *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-938 (D.C. Cir. 1988), suggests in dicta that an ICJ judgment might not be self-executing, but is distinguishable. The ICJ's *Nicaragua* judgment did not involve a self-executing treaty, but rather entailed aspects of international law (use of military force) that are non-self-executing in U.S. law. The plaintiffs who sought to enforce the *Nicaragua* judgment were strangers to the ICJ case, *see* 859 F.2d 938, while *Avena* explicitly deals with petitioners' situation and specifies the remedy for their claims under a self-executing treaty. Finally, Congress and the President had repudiated the *Nicaragua* judgment in a subsequent conflicting statute, which the court of appeals found controlling, *see* 859 F.2d 936-937. Here, no statute rejects *Avena*, and the President has formally endorsed compliance through state courts. *See* Section III.

[35] In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 735 (2004), this Court distinguished between rights under a treaty that the political branches have declared to be non-self-executing, and those under a self-executing treaty. Judicial enforcement of self-executing treaties is to be expected, and the same should follow for authoritative interpretations of self-executing treaties. Since the political branches have consistently treated the Vienna Convention as self-executing, *Sosa*'s reasoning favors enforcement of petitioners' treaty rights in state courts.

judicial competence to review and correct illegal acts in connection with criminal trials.

In failing to give petitioners the consular notice required by the Vienna Convention, authorities in Oregon and Virginia placed the United States in violation of its treaty obligations. The ICJ has held that an apology cannot suffice to remedy such violations in cases like those of petitioners involving "severe penalties." *See LaGrand*, para. 123; *Avena*, para. 120; Section I.B, I.D. The reparation required by the treaty is a judicial hearing for review and reconsideration of the conviction and sentence of petitioners and other similarly situated foreign nationals. Petitioners seek concrete vindication of a treaty-based right that the ICJ has found to require an effective judicial remedy. Failure to accord this treaty remedy would leave the United States in continuing violation of its obligation to ensure compliance with the Vienna Convention.

There can be no objection that *Avena* calls upon the United States to alter the way in which state criminal jurisdiction would be exercised.[36] Treaties often require states to modify the exercise of jurisdiction, and even to refrain from criminal jurisdiction. For example, the Vienna Convention (arts. 41-45)

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[36] If U.S. states were free to violate and then fail to remedy treaty violations, with no judicial remedy available, the United States as a whole would be responsible for state violations of international law. This Court has repeatedly affirmed the need to undertake a "searching scrutiny" of state or local actions affecting U.S. foreign relations that may provoke consequences for the nation as a whole. *See, e.g., Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979). The United States has accepted obligations to make reparations in respect of failure of state or local authorities to protect foreign nationals in accordance with international standards. *See* RESTATEMENT § 207, Reporters' Note 3. Where state courts can avoid such violations by carrying out the judgment of an authoritative international tribunal, they must do so.

In the early 20th century, in preparation for arbitration with Mexico involving protection of nationals of one country in the other's territory, State Department lawyers sought instructions on how to deal with legal issues concerning actions of states of the Mexican federation, in light of mirror-image considerations of U.S. federalism. The Department replied that "in our dealings with foreign Governments having a federal system similar to our own, we have invariably insisted on the liability of the Federal Government." 5 Hackworth 593, 597 (1943).

codifies the international law of consular immunity from criminal jurisdiction. Where a treaty provides for immunity of a foreign official, courts are required to recognize immunity, notwithstanding any impact on law enforcement interests. *See Commonwealth v. Jerez*, 390 Mass. 456, 457 N.E.2d 1105 (1983) (criminal complaint against consul dismissed because of Vienna Convention). *Cf. In re Dillon*, 7 Fed. Cas. 710 (No. 3914) (N.D. Cal. 1854) (recognizing treaty immunity of consul from defendant's subpoena in a criminal case, notwithstanding constitutional guarantee of compulsory process to obtain witnesses).

The obligation of state judges to give effect to treaty-based rights of foreigners is beyond doubt. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-237 (1796), this Court established that a treaty with Britain would prevail over state laws confiscating the property of British subjects:[37]

> [I]t is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to the treaty (or any other) made under the authority of the United States, null and void. National or Federal Judges are bound by duty and oath to the same conduct.

State courts have frequently upheld treaty rights in cases coming within their jurisdiction, without awaiting any instruction from the federal Executive or the legislature.[38]

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[37] *See also Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (treaty protected British property owners against forfeiture under state law). Treaties providing inheritance rights for aliens have been held to prevail over state laws. *See Hauenstein v. Lynham*, 100 U.S. 483 (1880); *Nielsen v. Johnson*, 279 U.S. 47 (1929); *Clark v. Allen*, 331 U.S. 503 (1947); *Kolovrat v. Oregon*, 366 U.S. 187 (1961). State prohibitions on land ownership have likewise had to yield to treaties. *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817). In *Asakura v. Seattle*, 265 U.S. 332 (1924), this Court said: "The treaty is binding within the State of Washington. ... It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." 265 U.S. at 341.

[38] The Court of Appeals of Kentucky, in an opinion that this Court called "very able" (*United States v. Rauscher*, 119 U.S. 407, 427-28 (1886)), wrote in a treaty case:

> When it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be

(Cont'd)

Indeed, state courts have regularly applied consular treaties on a self-executing basis. *See, e.g., In re Zalewski*, 292 N.Y. 322 (1944) (holding a consular treaty to be supreme law and giving it liberal construction to allow consul to act as agent for Polish national and exercise right of election under will).

Where the Senate unanimously approved a treaty designed to secure rights of Americans around the world and the ICJ has required review and reconsideration of convictions and sentences as the remedy for violation, no state court is free to ignore the treaty-based judgment in favor of the foreigner. If Oregon and Virginia were to defeat the national interest in treaty compliance, they would deny to the United States as a whole the benefits of the constitutional design, which makes treaty obligations supreme and requires state courts to enforce them.[39]

III. This Court Should Treat *LaGrand* And *Avena* As The Basis For The Rule Of Decision For State Courts, Without Regard To Executive Branch Positions Incompatible With The ICJ's Interpretation.

A. *LaGrand* And *Avena* Establish The Basis For The Rule Of Decision Applicable In All Vienna Convention Cases Involving "Severe Penalties."

Although *LaGrand* and *Avena* were brought on behalf of death row inmates, Vienna Convention obligations are not

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(Cont'd)

> disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-03 (1878).

[39] In *Hines v. Davidowitz*, 312 U.S. 52 (1941), this Court emphasized:

> One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. . . . – duties which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad.

312 U.S. at 64-65.

limited to capital crimes, nor does the obligation to afford a remedy for treaty violations apply only in capital cases. The import of *LaGrand* and *Avena* extends beyond the two LaGrand brothers and the 51 named individuals in *Avena*: *LaGrand* and *Avena* have stated an authoritative interpretation of the underlying treaty which establishes the rule for deciding comparable questions under the same treaty henceforth. (Section I.D.)

Amici understand the position of respondents to be that by virtue of Article 59 of the ICJ Statute,[40] *LaGrand* and *Avena* are not binding in respect of Mr. Sanchez-Llamas (whose case was not before the ICJ in *Avena*) or Mr. Bustillo (whose country has not participated in ICJ dispute settlement under the Optional Protocol). The United States as *amicus curiae* in *Medellin* took positions that would confine the international legal obligation flowing from *Avena* to the specific dispositive provisions of that judgment, and the domestic legal obligation to President Bush's memorandum on compliance with *Avena*.[41] These litigation positions misconstrue the nature of ICJ adjudication in cases of treaty interpretation and fail to recognize the authority attaching to ICJ decisions, not only in the jurisprudence of that body, but also for national courts.

Article 59 of the ICJ Statute reflects the well-understood position that the ICJ does not have a formal rule of *stare decisis*, while affirming the *res judicata* effects of the judgment in respect of the matter decided. Even without *stare decisis*, the reality is that once the ICJ has decided the merits of a question of international law, that decision is authoritative when corresponding questions arise later on. The ICJ "has, indeed, never expressly departed from a previous

[40] Article 59 provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

[41] *See* Brief for the United States as Amicus Curiae Supporting Respondent, *Medellin v. Dretke*, 125 S.Ct. 2088, pp. 38-39 n. 12 (on international legal obligation to comply with judgment but not with its reasoning); Brief for the United States as Amicus Curiae, *Ex Parte Medellin* (Ct. Crim. App. TX, Sept. 2, 2005), p. 18 n. 2. Both U.S. amicus briefs take the position that *Avena* has no domestic force except to the extent implemented by the President's memorandum of February 28, 2005. *Amici* respectfully disagree and urge this Court to apply *Avena* as the treaty-based rule of decision, for the reasons set forth herein.

decision."[42] Not only does the ICJ follow its own precedents,[43] but this Court has taken ICJ judgments as authoritative articulations of rules of international law,[44] as have other national tribunals,[45] even in matters concerning internal criminal jurisdiction.[46]

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[42] *See* Maurice Mendelson, *The International Court of Justice and the Sources of International Law*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 63, 81 (Vaughan Lowe & Malgosia Fitzmaurice, eds., 1996); *see also* E.W. Vierdag, *The International Court of Justice and the Law of Treaties*, *in ibid.* at 145, 154 ("great care is always taken to demonstrate the internal consistency of the Court's jurisprudence.").

[43] *See generally* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 26-31, 40-47, 63-65, 99-102 (1996) (on jurisprudential basis for ICJ reliance on own precedents); 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996 1627-1635 (1997) (on precedential effects beyond art. 59).

[44] *See, e.g.*, *United States v. Maine*, 475 U.S. 89 (1986); *United States v. Louisiana*, 470 U.S. 93, 107 (1985); *United States v. Louisiana*, 394 U.S. 11 (1969) (all referring to the *Fisheries* case (U.K. v. Nor.), 1951 I.C.J. 116, as legal authority in a maritime boundary dispute).

[45] *See generally* Sarita Ordonez & David Reilly, *Effect of the Jurisprudence of the International Court of Justice in National Courts*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 335, 352-369 (Thomas M. Franck & Gregory H. Fox eds., 1996) (invocation of ICJ cases by courts in Argentina, Canada, France, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, U.K. and U.S., and colonial and consular courts); *see also* Mohammed Bedjaoui, *The Reception by National Courts of Decisions of International Tribunals*, *in ibid.* at 21, 30-35; CHRISTOPH C. SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS 33-34, 74, 86, 92, 98, 129-130, 199, 204, 221, 257-258 (1981) (similar).

[46] After the ICJ decision in *Arrest Warrant of 11 April 2000* (D.R. Congo v. Belg.), 2002 ICJ 3, holding that Belgium was required to cancel an arrest warrant for the sitting foreign minister of the Congo, Belgian courts not only cancelled the specific warrant involved in the case but also dismissed proceedings involving high-level officials of other states. Belgium's Supreme Court, acting in a case involving Prime Minister Ariel Sharon of Israel, followed *Arrest Warrant* in finding the head of government to enjoy immunity under international law. *See* Jan Wouters, *The Judgement of the International Court of Justice in the* Arrest Warrant *Case: Some Critical Remarks*, 16 LEIDEN J. INT'L L. 253, 266 (2003); *see also* Alain Winants, *The* Yerodia *Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 LEIDEN J. INT'L L. 491, 505-07 (2003) (Belgian court decisions terminating prosecutions in *Yerodia*, *Sharon*, *and Gbagbo* following ICJ ruling altered outcomes from what advocates had expected under preexisting understandings of legal doctrine and legislative intent).

When the ICJ interprets a multilateral treaty, as it has done in *LaGrand* and *Avena*, its decision addresses the objective meaning of the treaty, which necessarily must apply throughout the treaty space and not as some special rule between litigants.[47] In the first case ever brought to the ICJ under the Vienna Convention, *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), the United States insisted - and the ICJ underscored in its judgment - that the import of the case transcended U.S.-Iranian bilateral relations and involved community-wide interests under the treaties involved.[48] In *Avena* (para. 47), the ICJ referred to the *Tehran Hostages* case in the context of affirming that the Vienna Convention "lays down certain standards to be observed by all States parties," and explained later in the judgment (para. 151) that nationals of all states parties are entitled to enjoy the rights and remedies elaborated therein.

B. This Court Should Decide The Meaning And Effect Of The Vienna Convention In Light Of *LaGrand* And *Avena*, Even If That Decision Differs From The Positions Of The Executive Branch.

Up through the merits phase of *Avena*, the United States maintained certain international and domestic litigation positions that have now been definitively rejected in *Avena*. To the extent that the lower courts may have acted on assumptions that are now known to be inconsistent with

[47] *See* Bedjaoui, *supra* n. 45, at 27 ("Going by the rule, Article 59 confines the effects of this interpretation to relations between the litigant States alone. But in reality, it is virtually impossible for all the parties to a multilateral convention (which may even be a universal one) to ignore the Court's interpretation of this convention for long."). *See also* Rosenne, *supra* n. 43, at 1635 (quoting *Aegean Sea Continental Shelf*, 1978 ICJ 3, 16, that "any pronouncement of the Court as to [the 1928 General Act for the Pacific Settlement of Disputes] may have implication in the relations between States other than [the parties]."). Because ICJ interpretations of multilateral treaties inevitably bear upon other treaty parties beyond the specific disputants, Article 63 of the ICJ Statute instructs the ICJ to notify all other parties to the treaty who then can intervene in the case as of right.

[48] *See, e.g.*, 1979 ICJ Pleadings, *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), pp. 11-12, 23-24, 169-170; *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 19-20 (Provisional Measures); 1980 ICJ 3, 42-43 (Merits).

the treaty obligations of the United States, this Court should instruct those courts to follow *Avena* and not to follow any Executive Branch positions incompatible with *Avena*.

President Bush's memorandum on compliance with *Avena* acknowledges the party status of the United States to the relevant treaties and the jurisdiction of the ICJ to decide the dispute; further acknowledges the existence of international obligations for the United States under *Avena*; and provides that compliance in state courts will discharge those obligations. Although the litigation position of the Executive Branch seeks to confine the import of the determination to the 51 individuals covered *Avena*, this Court should recognize that the same treaty-based rule of decision applies in petitioners' cases as well. (Sections I.D, III.A.)

Bearing in mind that the views of the Executive on treaty matters are entitled to deference but are "not conclusive upon a court called upon to construe such a treaty in a manner involving personal rights," *see, e.g., Charlton v. Kelly*, 229 U.S. 447, 468 (1913); *Perkins v. Elg*, 307 U.S. 325 (1939), this Court should endorse the Executive's views that are compatible with protecting foreign nationals in accordance with *Avena* but not follow Executive positions that would give foreign nationals a lesser level of protection than they are entitled to enjoy under *Avena*'s interpretation of the Vienna Convention.[49] This Court has consistently reserved to the judiciary the prerogative of *protecting* the personal rights claimed by individuals under treaties beyond the Executive position and has never been known to *restrict* a treaty right that the Executive has acknowledged or that is otherwise ascertainable as a matter of objective treaty interpretation. *Cf. Factor v. Laubenheimer*, 290 U.S. 276 (1933) (interpretation expanding rather than restricting treaty rights is to be preferred); *Valentine v. United States ex*

[49] No issue is raised here of deferring to Executive foreign policy, apart from the federal policy favoring treaty compliance in general and compliance with *Avena* in particular. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004); *Republic of Austria v. Altmann*, 541 U.S. 677, 701-701 (2004) (on deference to the Executive for case-specific foreign policy reasons).

rel. Neidecker, 299 U.S. 5, 10-11 (1936) (rejecting claim of Executive power as unsupported by treaty); *Baker v. Carr*, 369 U.S. 186, 212 (1962) (courts must resolve conflicts with state law in favor of treaty compliance).

The jurisprudence of this Court accepts the authority of the federal government to settle disputes with foreign governments in a manner that binds state courts. In *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), this Court found that the federal policy of the United States adopted in the context of definitive resolution of disputes with the Soviet Union would displace contrary state law. In *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), this Court confirmed that an executive policy in favor of achieving "legal peace" with foreign governments had to prevail over a state law affecting the jurisdiction of state courts.[50] Whatever might be the limits of federal authority to resolve disputes with foreign governments in some hypothetical scenario not involved here,[51] it falls clearly within the core of federal power under the Constitution to accept the outcome of a treaty-based dispute resolution process as definitively settling a dispute over treatment of foreign nationals by the states and for this Court to ensure that state courts carry out the treaty obligations in question.

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[50] *See also Dames & Moore v. Regan*, 453 U.S. 654, 679-680 (1981) (upholding executive power to settle claims through international dispute mechanism). In *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 383 (2000), this Court invalidated a state law that had embroiled the national government for some time in an international dispute settlement procedure. *A fortiori*, in the face of a binding judgment from treaty-based dispute settlement, a state rule must not impede treaty compliance and a judicial remedy must be available.

[51] No question is presented here of constitutional rules on expenditures from the Treasury, or of statutory restrictions on acceptance of a particular dispute settlement procedure or explicit limitations on the effects of a dispute settlement ruling within the U.S. legal system. *Cf., e.g.*, Uruguay Round Agreements Act, 19 U.S.C. §§ 3501, 3512(b)(2) (restricting legal challenges to state laws in relation to dispute settlement procedures of World Trade Organization).

Ultimately, it is the interpretation of this Court that must have conclusive effect under the Constitution.[52] In interpreting the legal obligations of the United States in the instant case, it would be no mark of disrespect to the Executive Branch, but a justified assertion of the role of this Court consistent with the principle of separation of powers, if the Court, as *Amici* urge, exercises its independent judgment to accept the interpretation embodied in *LaGrand* and *Avena*.

CONCLUSION

Amici urge this Court to ensure that actions and omissions of the States of Oregon and Virginia are remedied by the courts of those States, as proper organs of treaty compliance. Refusal to grant the treaty-based remedy for Vienna Convention violations as determined by the ICJ would undermine the U.S. ability to insist on compliance by other states with their obligations under the Vienna Convention. Review and reconsideration of petitioners' convictions and sentences is necessary to avoid the adverse consequences that would result from failure to comply, which could include prejudice in connection with dispute settlement under other treaties.

By remanding with instructions to afford the remedy of review and reconsideration required to redress the violation of the treaty as interpreted in *LaGrand* and *Avena*, this Court will fulfill its responsibility within our constitutional system and will maintain compliance with the international obligations of the United States.

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[52] *See* Restatement, § 112(2) ("The determination and interpretation of international law present federal questions and their disposition by the United States Supreme Court is conclusive for other courts in the United States") and comment *a*.

Respectfully submitted,

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Appendix

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In the Supreme Court of the United States

MOISES SANCHEZ-LLAMAS
Petitioner,

v.

OREGON

MARIO A. BUSTILLO
Petitioner,

v.

GENE M. JOHNSON,
DIRECTOR VIRGINIA DEPT. OF CORRECTIONS

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF OREGON AND THE SUPREME COURT OF VIRGINIA

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INTEREST OF AMICI CURIAE

Amici curiae respectfully submit this brief addressing the question whether the Vienna Convention on Consular Relations creates individually enforceable rights. Amici are professors of law whose areas of expertise include international law, federal courts, and U.S. foreign relations law. We have an interest in providing this Court with an historical perspective on the judicial enforcement of treaties in U.S. courts. Amici are listed in the appendix to this brief.[1]

SUMMARY OF ARGUMENT

Article 36(1) of the Vienna Convention on Consular Relations (VCCR) protects the primary rights of individuals. Under the Supremacy Clause, state courts are bound to enforce the treaty on behalf of individuals whose primary rights are violated. Analysis of Supreme Court decisions in the first forty years of U.S. constitutional history shows that the Framers believed that courts do not need express authorization from the political branches to provide individual remedies for violations of treaty rights. In accordance with the Framers' original understanding, individual defendants like Mr. Sanchez-Llamas have the capacity to invoke a treaty before a domestic court if they were harmed by a violation of their treaty-based primary rights, even if the treaty at issue is silent with respect to domestic judicial remedies. Similarly, individual plaintiffs have the capacity to invoke a treaty before a domestic court if domestic law grants them a right of access to court (as the

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[1] The parties' letters of consent to the filing of amici briefs have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of the Court, amici curiae state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than amici, their members, or their counsel, has made a monetary contribution for preparing or submitting this brief.

Virginia habeas statute does for Mr. Bustillo) and they were harmed by a violation of their treaty-based primary rights, even if the treaty at issue is silent with respect to domestic judicial remedies.

In *State v. Sanchez-Llamas*, the Oregon Supreme Court adopted a presumption that individual litigants cannot obtain remedies for treaty violations unless the treaty itself creates a private right of action. That presumption is contrary to the Framers' original understanding of the judiciary's role in treaty enforcement. Between 1789 and 1829, this Court decided 34 cases in which an individual litigant raised a claim or defense on the basis of a treaty. In every case where the Court found a violation of an individual's treaty-based primary right – a total of 18 cases – the Court granted a remedy. In two of those 18 cases, the individual sued to enforce a treaty that created an express private right of action. In the other 16 cases, though, the Court awarded a remedy even though the treaty at issue did not create a private right of action. This consistent pattern of Supreme Court decisions during the first forty years of U.S. constitutional history provides powerful evidence of the Framers' views. These cases demonstrate that the presumption adopted by the Oregon Supreme Court is contrary to the Founders' original understanding of the judiciary's role in treaty enforcement.

The Oregon Supreme Court's presumption against judicial remedies for treaty violations is also squarely at odds with two centuries of consistent Supreme Court jurisprudence. For more than two hundred years, this Court has consistently granted judicial remedies in cases where a treaty protects an individual's primary rights and those treaty rights have been violated. In fact, this Court has never denied a judicial remedy to an individual whose treaty rights

were violated, except in cases where Congress enacted a statute that superseded the treaty under the later-in-time rule.

There is no dispute that Article 36 of the VCCR is the Law of the Land under the Supremacy Clause. Moreover, it is evident from the plain meaning of Article 36 that the treaty protects the primary rights of individuals. Therefore, this Court should hold that any individual who has been harmed by a violation of his primary rights under Article 36 is entitled to a judicial remedy for that violation, except insofar as amendments to the federal habeas statute enacted after ratification of the VCCR may preclude the availability of federal habeas relief for some petitioners who would otherwise be entitled to a judicial remedy.

ARGUMENT

I. DECISIONS IN TREATY CASES FROM 1789 TO 1829 SUPPORT A STRONG PRESUMPTION IN FAVOR OF JUDICIAL REMEDIES FOR VIOLATIONS OF INDIVIDUAL TREATY RIGHTS

Treaties frequently create primary rights for individuals. For the purpose of this brief, an individual has a "primary right" under a treaty if a state party to the treaty has a legal duty under the treaty to behave in a particular way, or to refrain from behaving in a particular way, with respect to that individual. *See generally* Henry M. Hart, Jr. & Albert M. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Eskridge & Frickey, eds. 1994), at 130-31 (defining primary duties), and at 136-37 (noting that a "primary right" is "the mere obverse" of a duty). Treaties rarely, though, explicitly address the question whether individuals have a private right of action – that is, a right of access to domestic courts. Similarly, treaties usually

do not explicitly address the question whether individuals have the power to invoke the treaty before a domestic court.

The Oregon Supreme Court assumed that individuals cannot enforce their primary rights under the VCCR unless the Convention itself creates a private right of action. *See State v. Sanchez-Llamas*, 108 P.3d 573, 575-78 (Or. 2005). That assumption is clearly mistaken. In the statutory context, the Administrative Procedure Act (APA) creates a private right of action that authorizes individual suits to enforce federal statutes that do not themselves create a private cause of action. *See, e.g., Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004) (where plaintiffs sued to enforce a statute that did not create a private right of action, Justice Scalia, writing for a unanimous court, held that "[t]he APA authorizes suit" for federal statutory violations "[w]here no other statute provides a private right of action"). Similarly, Virginia's habeas corpus statute grants Mr. Bustillo a private right of action to advance his claim "that he is detained without lawful authority," Va. Code § 8.01-654, and the Supremacy Clause requires the Virginia courts to apply the VCCR as a rule of decision to decide the merits of that claim. (Since Mr. Sanchez-Llamas is a defendant in a criminal proceeding, the question of a right of action does not arise because he was haled into court against his will.)

Between 1789 and 1829, this Court consistently granted remedies to individuals who were harmed by violations of their treaty-based primary rights, despite the fact that the treaties at issue did not create private rights of action and did not expressly empower individuals to invoke the treaties before a domestic court. During this period, the Court decided 34 cases in which an individual litigant raised

a claim or defense on the basis of a treaty.[2] All 34 cases are consistent with the following rule: if an individual was harmed by a past violation of his primary treaty rights, or if he is likely to be harmed by a future violation of those rights, then the individual is entitled to a judicial remedy, even if the treaty itself does not create a private right of action, and even if the treaty says nothing about the capacity of individuals to invoke the treaty before a domestic court. This rule is a corollary of the principle endorsed by the Supreme Court in *Marbury v. Madison* "that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded." 5 U.S. 137, 163 (1803) (quoting Blackstone's Commentaries). If a particular treaty provision is the Law of the Land under the Supremacy Clause, and that provision protects primary individual rights, the *Marbury* principle establishes a strong presumption that individuals who are harmed by a violation of their treaty-based primary rights are entitled to domestic judicial remedies. *See Owings v. Norwood's Lessee*, 9 U.S. 344, 348 (1809) (Marshall, C.J.) ("Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.").

Part One of this brief demonstrates that all 34 treaty cases decided by the Supreme Court between 1789 and 1829 are consistent with the *Marbury* principle. These consistent precedents in the Framing Period provide particularly powerful evidence of the Framers' views concerning the judiciary's role in the enforcement of treaties. This Court has emphasized that the force of constitutional precedents "tends

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[2] This figure does not include cases involving treaties with Indian tribes.

to increase in proportion to their proximity to the Convention in 1787." *Powell v. McCormack*, 395 U.S. 486, 547 (1969). In the case of treaties, the consistent precedents of this Court in the initial decades of the Constitution demonstrate with clarity the contemporaneous understanding that it is the judiciary's responsibility to provide remedies for individuals who are harmed by violations of their treaty-based primary rights. Moreover, in cases where a court has jurisdiction, the court does not need express authorization from the political branches – either in the form of a federal statutory right of action, or in the form of an express private right of action in the treaty – to provide judicial remedies for violations of individual treaty rights, because it is the judiciary's responsibility within our system of divided government to supply the remedy for violations of treaty-based primary rights.

For ease of analysis, Part One divides the 34 treaty cases decided by the Supreme Court between 1789 and 1829 into four groups: twelve cases where the plaintiff invoked a treaty and prevailed on the basis of the treaty; six cases where the defendant invoked a treaty and prevailed on the basis of the treaty; ten cases where the party invoking the treaty lost on the merits of the treaty claim; and six cases that do not fit into any of the other categories.

A. This Court Regularly Granted Remedies to Plaintiffs in Cases Where the Treaty at Issue Did Not Create a Private Right of Action

Between 1789 and 1829, this Court decided twelve cases in which an individual plaintiff secured a remedy for a violation of a treaty-based primary right. In two of those cases, the treaty at issue granted the plaintiff a private right of action. *See The Bello Corrunes*, 19 U.S. 152 (1821)

(restoring ship and cargo to Spanish shipowners because ship was captured in violation of bilateral treaty between U.S. and Spain); *The Pizarro*, 15 U.S. 227 (1817) (awarding restitution to Spanish claimants because ship was seized in violation of bilateral treaty between U.S. and Spain).[3]

In the other ten cases, though, the plaintiff brought suit on the basis of a domestic right of action, and the treaty provided a primary rule for deciding the merits of the claim. *See Hughes v. Edwards*, 22 U.S. 489 (1824) (suit to foreclose on mortgage); *Soc'y for Propagation of Gospel v. New Haven*, 21 U.S. 464 (1823) (action for ejectment); *Craig v. Radford*, 16 U.S. 594 (1818) (equitable action to divide a tract of land); *Chirac v. Lessee of Chirac*, 15 U.S. 259 (1817) (action for ejectment); *Fitzsimmons v. Newport Ins. Co.*, 8 U.S. 185 (1808) (suit for breach of contract); *Higginson v. Mein*, 8 U.S. 415 (1808) (suit to foreclose on mortgage); *Hopkirk v. Bell*, 7 U.S. 454 (1806) (suit to recover payment on bond); *Ogden v. Blackledge*, 6 U.S. 272 (1804) (suit to recover payment on bond); *United States v. The Schooner Peggy*, 5 U.S. 103 (1801) (libel in admiralty court); *Ware v. Hylton*, 3 U.S. 199 (1796) (suit to recover payment on bond). These cases are analogous to *Bustillo v. Johnson*, because Mr. Bustillo brought suit on the basis of Virginia's habeas

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[3] In both *Bello Corrunes* and *Pizarro*, the Spanish claimants had an express private right of action under the Treaty of Friendship, Limits and Navigation, Oct. 27, 1795, art. 20, U.S.-Spain, *reprinted in* 2 Treaties and Other International Acts of the United States of America 318, 334-35 (Hunter Miller ed., 1931) [hereinafter, "1795 Treaty with Spain"] ("It is also agreed that the inhabitants of the territories of each party shall respectively have free access to the Courts of Justice of the other, and they shall be permitted to prosecute suits for the recovery of their properties . . . and for obtaining satisfaction for the damages which they may have sustained . . . ").

statute, and the VCCR provides a primary rule for deciding the merits of his claim.

In each of the ten cases cited above, where the plaintiff brought suit on the basis of a domestic right of action, the Court applied the relevant treaty provision as a rule of decision in the case, despite the fact that the treaty at issue did not create a private right of action. In none of these ten cases did the treaty expressly empower the plaintiff to invoke the treaty before a domestic court. Nevertheless, in each case the Court awarded the plaintiff a remedy because he had been harmed by a past violation of a primary treaty right, or was likely to be harmed by a future violation of a primary treaty right. *See Hughes*, 22 U.S. 489 (ordering foreclosure and sale of mortgaged property to secure individual property right protected by article 9 of Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, art. 9, U.S.-Great Britain, *reprinted in* 2 Treaties and Other International Acts of the United States of America, 245, 253-54 (Hunter Miller ed., 1931) [hereinafter, "Jay Treaty"]; *Soc'y for Propagation of Gospel*, 21 U.S. 464 (ordering restoration to plaintiff of land that had been wrongfully expropriated by state legislative act in violation of article 6 of the Definitive Treaty of Peace, Sept. 3, 1783, art. 6, U.S.-Great Britain, *reprinted in* 2 Treaties and Other International Acts of the United States of America, 151, 155 (Hunter Miller ed., 1931)); *Craig*, 16 U.S. 594 (ordering defendants to convey land to plaintiff because defendants had wrongfully appropriated land in violation of article 9 of Jay Treaty); *Chirac*, 15 U.S. 259 (invalidating Maryland law and restoring property rights of French plaintiffs because state had wrongfully terminated those rights in violation of article 7 of the Convention Between the French Republic and the United States of America, Sept. 30, 1800, art. 7, U.S.-France, *reprinted in* 2 Treaties and Other International Acts of the United States of America, 457, 462-63 (Hunter Miller ed.,

1931) [hereinafter, "1800 Convention"]; *Fitzsimmons*, 8 U.S. 185 (ordering insurance company to make contractual payment to insured because British prize court had wrongfully condemned the insured ship, in violation of article 18 of Jay Treaty); *Higginson*, 8 U.S. 415 (ordering debtor to pay debt wrongfully withheld from creditor in violation of article 5 of the Definitive Treaty of Peace); *Hopkirk*, 7 U.S. 454 (ordering debtor to pay debt wrongfully withheld from creditor in violation of article 4 of the Definitive Treaty of Peace); *Ogden*, 6 U.S. 272 (ordering debtor to pay debt wrongfully withheld from creditor in violation of article 4 of the Definitive Treaty of Peace); *The Schooner Peggy*, 5 U.S. 103 (ordering restoration of ship to French owner, as required by article 4 of the 1800 Convention); *Ware*, 3 U.S. 199 (ordering debtor to pay debt wrongfully withheld from creditor in violation of article 4 of the Definitive Treaty of Peace).

In sum, this Court's decisions during this period support a strong presumption that an individual who was harmed by a past violation of his treaty-based primary rights, or is likely to be harmed by a future violation of those rights, is entitled to a judicial remedy, even if the treaty at issue does not create a private right of action or expressly empower the individual to invoke the treaty before a domestic court.

B. This Court Regularly Awarded Judgment for Defendants in Cases Where the Treaty Did Not Expressly Empower Individuals to Invoke the Treaty

Between 1789 and 1829, this Court decided six cases in which an individual defendant secured a judgment to protect a primary treaty right. In each of these six cases, the Court applied the relevant treaty provision as a rule of decision, despite the fact that the treaty at issue did not expressly empower the defendant to invoke the treaty before

a domestic court. In each of the six cases, the rationale supporting judgment for the defendant relied, at least in part, on the Court's assessment that a judgment for the plaintiff would have infringed upon the defendant's treaty-based primary rights. *See Carneal v. Banks*, 23 U.S. 181 (1825) (where plaintiff sued to rescind contract for land swap, claiming that defendant did not have valid title to land, Court dismissed bill for rescission because defendant derived title from French citizen whose right to hold land in U.S. territory was protected under article 11 of Treaty of Amity and Commerce, Feb. 6, 1778, art. 11, U.S.-France, *reprinted in* 2 Treaties and Other International Acts of the United States of America, 3, 11-12 (Hunter Miller ed., 1931) [hereinafter "1778 Treaty with France"); *Orr v. Hodgson*, 17 U.S. 453 (1819) (where plaintiff sued to rescind contract for purchase of land, challenging validity of defendant's title, Court dismissed bill for rescission because defendant had valid title protected by article 6 of Definitive Treaty of Peace and article 9 of Jay Treaty); *Jackson v. Clarke*, 16 U.S. 1 (1818) (where plaintiff sued for ejectment, Court dismissed suit because article 9 of Jay Treaty protected rights of British citizens to hold and inherit land); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603 (1813) (where plaintiff sued for ejectment, Court dismissed suit because defendant's title to land was secured by article 9 of Jay Treaty); *Moodie v. The Ship Phoebe Anne*, 3 U.S. 319 (1796) (where British consul filed libel to recover ship captured by French privateer, Court awarded judgment to French privateer because article 19 of 1778 Treaty with France protected right of French citizens to enter U.S. ports and obtain items necessary for repairs); *Georgia v. Brailsford*, 3 U.S. 1 (1794) (where State of Georgia brought suit, asserting entitlement to pre-war debt owed to British citizen, Court held that article 4 of Definitive Treaty of Peace protected British defendant's right to recover debt).

In none of these cases did the treaty at issue expressly empower the defendant to invoke the treaty as a defense in a judicial proceeding. The absence of any such treaty provision, however, did not preclude individual enforcement of the treaty. To the contrary, the Court applied the presumption that an individual defendant who has been harmed by a violation of his primary treaty rights, or is likely to be harmed by a future violation of those rights, has the capacity to invoke the treaty and is entitled to a judicial remedy. Since Mr. Sanchez-Llamas is also a defendant in a judicial proceeding, like the defendants in the cases cited above, he has the capacity to invoke the VCCR as a defense, and he is entitled to a judicial remedy, if he was harmed by a violation of his treaty-based primary rights.

C. The Cases Where Treaty Claimants Lost Are Consistent with the Presumption in Favor of Judicial Remedies for Violations of Individual Treaty Rights

Of the 34 treaty cases decided by this Court between 1789 and 1829, there were ten cases where the party invoking the treaty lost on the merits. In none of those cases, however, did the Court rule that the treaty was not judicially enforceable. Rather, in each case, the party invoking the treaty lost on the merits, either because the treaty did not grant that party the primary right he asserted, or because there was no violation of that right. *See Foster v. Neilson*, 27 U.S. 253 (1829) (where plaintiffs claimed title to land on the basis of article 8 of Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, U.S.-Spain, *reprinted in* 3 Treaties and Other International Acts of the United States of America, 3, 9 (Hunter Miller ed., 1933) [hereinafter "Florida Treaty"], Court held that treaty did not grant plaintiffs title to disputed property); *Comegys v. Vasse*, 26 U.S. 193 (1828) (where arbitral commission established pursuant to Florida Treaty

awarded money judgment to creditors of bankrupt person, treaty did not grant bankrupt party right to recover judgment from creditors); *De la Croix v. Chamberlain*, 25 U.S. 599 (1827) (Florida Treaty protected plaintiff's inchoate title to land, but inchoate title was insufficient to permit plaintiff to recover land in action for ejectment); *Blight's Lessee v. Rochester*, 20 U.S. 535 (1822) (plaintiffs, who claimed title to land by descent from British citizen, lost on merits because title of British citizen was not protected by Jay Treaty or by Definitive Treaty of Peace); *The Amiable Isabella*, 19 U.S. 1 (1821) (Spanish claimant, who invoked article 17 of 1795 Treaty with Spain, lost on merits because treaty did not grant him the immunity he claimed); *The Nuestra Senora de la Caridad*, 17 U.S. 497 (1819) (Spanish shipowner, who invoked 1795 Treaty with Spain, lost on merits because treaty did not protect goods from capture); *The Nereide*, 13 U.S. 388 (1815) (American privateer, who invoked article 15 of 1795 Treaty with Spain, lost on merits because law of nations protected cargo from capture and treaty did not alter law of nations in that respect); *Smith v. Maryland*, 10 U.S. 286 (1810) (defendant, who invoked article 6 of Definitive Treaty of Peace, lost on merits because treaty provision protecting land from confiscation did not apply to subject property); *M'Ilvaine v. Coxe's Lessee*, 8 U.S. 209 (1808) (where defendant asserted that Definitive Treaty of Peace deprived plaintiff of property rights, Court rejected argument on merits and affirmed plaintiff's title to land); *Glass v. The Sloop Betsey*, 3 U.S. 6 (1794) (where French privateer contended that article 17 of 1778 Treaty with France barred District Court's exercise of jurisdiction in prize case, Court ruled that treaty did not deprive District Court of jurisdiction, and remanded case for adjudication on merits).

In sum, none of these cases support a presumption against individual enforcement of treaties. To the contrary, the cases merely support the unremarkable proposition that

an individual whose primary rights are not protected by a treaty cannot obtain a remedy on the basis of that treaty.

D. Other Cases From This Period Are Consistent with the Presumption in Favor of Judicial Remedies for Violations of Individual Treaty Rights

In addition to the cases discussed above, this Court decided six other cases between 1789 and 1829 in which an individual litigant raised a claim or defense on the basis of a treaty. In two of those cases, the Court did not rule on the merits of the treaty claim. *See Harden v. Fisher*, 14 U.S. 300 (1816) (remanding case to circuit court for additional factfinding); *United States v. Lawrence*, 3 U.S. 42 (1795) (dismissing mandamus petition directed against a federal judge because the judge acted within the scope of his discretionary authority). In two other cases, the Court did not apply the treaty as a rule of decision, but merely consulted the treaty as an aid to construing some other provision of law, which provided the rule of decision in the case. *See Henderson v. Poindexter's Lessee*, 25 U.S. 530 (1827) (prevailing plaintiff, whose title to land did not depend on treaty, invoked Definitive Treaty of Peace and 1795 Treaty with Spain to establish that defendant's land grant from Spanish government was void because land was part of United States at time of Spanish grant); *Harcourt v. Gaillard*, 25 U.S. 523 (1827) (prevailing defendant, whose title to land did not depend on treaty, invoked Definitive Treaty of Peace to establish that plaintiff's grant from British governor was void because land was part of United States at time of British grant). In one case, each of the opposing parties invoked a different treaty in support of its case. *See Talbot v. Janson*, 3 U.S. 133 (1795) (rejecting captor's argument that treaty between U.S. and France deprived District Court of jurisdiction, and ruling in favor of Dutch shipowner on the

basis of a treaty between U.S. and Netherlands). These five cases neither support nor refute the presumption in favor of judicial remedies for violations of individual treaty rights.

The only other treaty case during this period was *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809), which involved a dispute related to land in Maryland. The original owner of the land mortgaged the property to Scarth, a British citizen. In 1732, Waters obtained a judgment of condemnation against the land for a debt due to him from Scarth, but Waters never executed the judgment. *Id.* at 344. Owings, a Maryland citizen, derived his claim to the land from Waters. In 1780, Maryland confiscated all property in the state belonging to British subjects. *Id.* at 346. The plaintiff had a patent from the State of Maryland, issued in 1800. *Id.* at 344. Plaintiff sued to eject Owings. In response, Owings invoked article 5 of the Definitive Treaty of Peace, which protected the rights of British citizens whose property was confiscated during the Revolutionary War. The Court's central holding was that it lacked jurisdiction because the case did not "arise under" a treaty. *Id.* at 347-48.

The case did not arise under a treaty because Owings, who invoked the treaty, did not have any property rights protected by the treaty. In contrast, Scarth's heirs, who were British citizens, did have property rights protected by the treaty, because Scarth's mortgage was confiscated during the war. Thus, "if Scarth or his heirs had claimed, it would have been a case arising under a treaty," because Scarth's mortgage was protected from confiscation by article 5 of the treaty. *Id.* at 348. In sum, *Owings* anticipates the modern rule that individuals lack standing to enforce the rights of unrelated third parties. Owings could not assert Scarth's treaty rights because he was not Scarth's heir or successor-in-interest. But Justice Marshall left no doubt that Scarth's heirs could have invoked the Definitive Treaty of Peace,

despite the fact that the treaty itself did not expressly grant them the power to invoke the treaty as a defense in an action for ejectment.

E. *Foster* is Consistent with the Presumption in Favor of Judicial Remedies for Violations of Individual Treaty Rights

The Oregon Supreme Court cited *Foster v. Neilson*, 27 U.S. 253 (1829) in support of the proposition that there is "a presumption against the creation of individual, judicially enforceable rights" by means of treaties. *State v. Sanchez-Llamas*, 108 P.3d 573 (Or. 2005). In fact, *Foster* is entirely consistent with the approach reflected in the other treaty cases decided by the Supreme Court during this period, which applied a strong presumption in favor of judicial remedies for violations of individual treaty rights.

Foster involved a dispute over title to land in Louisiana. The land at issue was part of a large area that was the subject of a political dispute between the United States and Spain between 1803, when the United States acquired Louisiana from France, and 1819, when the U.S. purchased Florida from Spain. *See Foster*, 27 U.S. at 300-310. During that period, Spain asserted that the land east of the Mississippi river and south of thirty-one degrees latitude was a part of Florida, which belonged to Spain. The United States, in contrast, asserted that the disputed territory was part of Louisiana, which the U.S. had acquired from France. The plaintiffs in *Foster* traced their title to an 1804 land grant from the Spanish governor of Florida. *See id.* at 253-55. The Court in *Foster* held that the plaintiffs could not establish a valid title on the basis of the 1804 Spanish grant because the United States had acquired the land when it purchased Louisiana in 1803, and the Spanish governor had no authority to grant land in U.S. territory. *Id.* at 307-09.

That, however, was not the end of the matter. The Court next considered whether the plaintiffs could establish a valid title on the basis of article 8 of the Florida Treaty. *See id.* at 310-15. Article 8 stipulated that land grants made before 1818 by the Spanish government in the "Territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands." Florida Treaty, *supra*, art. 8. The Justices could not agree among themselves whether the disputed territory east of the Mississippi River and south of 31 degrees latitude was included within the terms of Article 8. *See Foster*, 27 U.S. at 313. Marshall, accordingly, devised a solution that enabled the Court to sidestep this disagreement. The Court held that even if Article 8 did apply to the land at issue, the treaty itself did not secure the property rights of individual recipients of Spanish land grants because the specific words of Article 8 – "shall be ratified and confirmed" – merely promised future legislative action by the U.S. government to ratify and confirm the prior Spanish land grants. *See id.* at 314. This holding later became the basis of the modern doctrine of non-self-executing treaties. Pursuant to this holding, the Court awarded judgment to the defendants. The rationale, though, was not that the treaty was not enforceable by private individuals. Rather, the rationale was that the plaintiffs did not have valid title to the land because the initial land grant from the Spanish governor was void, and the U.S. promise of future legislative action to ratify and confirm that grant was never executed.

In sum, between 1789 and 1829 there was not a single case in which this Court denied a remedy to an individual whose treaty-based primary rights had been violated. There were, however, 16 cases where an individual litigant obtained a remedy for a treaty violation, despite the fact that the treaty at issue did not create a private right of action and did not expressly empower individuals to invoke the treaty before a

domestic court. Thus, the assertion that treaties are not enforceable by private parties unless the treaty itself creates a private right of action -- which has been endorsed by several state courts and lower federal courts in recent cases involving the VCCR -- is squarely at odds with the Framers' original understanding of the judiciary's role in treaty enforcement.

II. MORE RECENT DECISIONS BY THIS COURT ALSO SUPPORT A STRONG PRESUMPTION IN FAVOR OF JUDICIAL REMEDIES FOR VIOLATIONS OF INDIVIDUAL TREATY RIGHTS

A. This Court Continues to Grant Individual Remedies in Cases Where the Treaty at Issue Does Not Create a Private Right of Action

The presumption in favor of judicial remedies for violations of individual treaty rights is not merely a relic of the past. This Court continued to apply that presumption throughout the nineteenth and twentieth centuries, and even into the twenty-first century. Four cases from three different centuries illustrate this point.

In *United States v. Rauscher*, 119 U.S. 407 (1886), the appellee challenged his criminal conviction on the ground that it violated Article X of the Webster-Ashburton Treaty, Aug. 9, 1842, art. X, U.S.-Great Britain, *reprinted in* 4 Treaties and Other International Acts of the United States of America, 363, 369-70 (Hunter Miller ed., 1934). The treaty did not expressly empower Rauscher to invoke Article X as a defense to criminal charges. Nevertheless, this Court ruled in favor of Rauscher on the basis of his treaty defense, holding that he had "a right to be exempt from prosecution upon the charge set forth in the indictment." *Rauscher*, 119 U.S. at

409. *Rauscher* is especially relevant to *Sanchez-Llamas*, because it demonstrates that a criminal defendant who has been harmed by a violation of his treaty rights has the power to invoke that treaty as a defense to criminal prosecution, even if the treaty is silent with respect to domestic judicial remedies.

In *Chew Heong v. United States*, 112 U.S. 536 (1884), a Chinese laborer who was detained on a ship near San Francisco filed a habeas corpus petition in federal court to obtain release from custody. *Id.* at 538. Chew Heong alleged that his detention violated Article II of an 1880 treaty between the United States and China, which stated: "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will." Treaty Concerning Immigration, Nov. 17, 1880, U.S.-China, 22 Stat. 826. The treaty itself did not grant Chew Heong a right of access to U.S. court, nor did it expressly grant him the power to invoke the treaty before a U.S. court. Even so, the Supreme Court granted Chew Heong's habeas petition, holding that he was "entitled to enter and remain in the United States." *Chew Heong*, 112 U.S. at 560. In short, the treaty was judicially enforceable because the treaty created a primary individual right and the federal habeas statute provided a private right of action that enabled him to enforce that primary right. *Chew Heong* is especially relevant to *Bustillo*, because it demonstrates that a petitioner can bring a habeas corpus action to enforce his treaty rights, even if the treaty at issue does not create a private right of action.

The pattern of treaty enforcement described above, which combines treaty-based primary rights with domestic rights of action, continued into the twentieth century. In *Asakura v. Seattle*, 265 U.S. 332 (1924), the plaintiff was a Japanese national who operated a pawnbroker business in Seattle. *Id.* at 339. Seattle passed an ordinance that

prohibited non-U.S.-citizens from operating a pawnbroker business in the city. *Id.* at 339-40. Plaintiff sued to enjoin enforcement of the ordinance on the grounds that it violated a bilateral treaty with Japan. Treaty of Commerce and Navigation, Feb. 21, 1911, U.S.-Japan, 37 Stat. 1504. The treaty granted Japanese citizens a primary right "to carry on trade" in the United States "upon the same terms as native citizens or subjects." *Id.*, Art. I. However, the treaty did not expressly grant Japanese citizens a right to sue for injunctive relief. Nevertheless, the Supreme Court affirmed an injunction in favor of the plaintiff, relying on the traditional equitable action for injunctive relief as the basis of a domestic right of action to enforce the plaintiff's treaty-based primary rights.

Just three terms ago, in *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), this Court upheld a judicial remedy for a private plaintiff who sued to enforce international agreements that did not themselves create a private right of action. In *Garamendi*, a trade association sued in federal court to enjoin enforcement of a California statute that required insurance companies to disclose information about "insurance policies issued to persons in Europe, which were in effect between 1920 and 1945." *Id.* at 409. The Court held that certain bilateral agreements between the United States and European governments preempted the California law.[4] *Id.* at 420-27. The bilateral agreements manifest the

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[4] The Court's preemption analysis relies primarily on three bilateral executive agreements: Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.-F.R.G, 39 I.L.M. 1298 [hereinafter, "U.S.-Germany Agreement"]; Agreement Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," October 24, 2000, U.S.-Aus., 40 I.L.M. 523; Agreement Concerning Payments for Certain Losses Suffered During World War II, January 18, 2001, U.S.-Fr., Temp. State Dep't No. 01-36.

drafters' expectations that the federal government might invoke the agreements in support of motions to dismiss private lawsuits. *See* U.S.-Germany Agreement, art. 2, para. 1 ("The United States shall, in all cases in which the United States is notified that a claim described in article 1(1) has been asserted in a court in the United States, inform its courts . . . that dismissal of such cases would be in its foreign policy interest."). In *Garamendi*, though, the insurance companies invoked the bilateral agreements offensively in support of a suit against the state Insurance Commissioner to enjoin enforcement of a California statute. *See Garamendi*, 539 U.S. at 412. There is no language in any of the agreements indicating that the drafters intended to authorize this type of private lawsuit. Even so, the Court granted relief to plaintiffs on the grounds that the agreements preempted California law under the Supremacy Clause. *Id.* at 427-29. Thus, the Court in *Garamendi* tacitly relied on the Supremacy Clause as a basis for a private right of action to enforce international agreements that did not provide plaintiffs a right to sue in U.S. courts.[5]

In sum, the claim that treaties are not judicially enforceable by private parties unless the treaty itself creates a private right of action is refuted by two centuries of jurisprudence in which this Court has consistently approved remedies for individuals whose treaty rights were violated,

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[5] There are numerous cases decided in the past two decades in which the Supreme Court has tacitly relied on the Supremacy Clause as a basis for a private right of action to enjoin enforcement of state laws that are preempted by federal statutes. *See* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 390-401 (2004) (analyzing cases). *Garamendi* differs from those cases in that the preemptive federal laws are international agreements, not federal statutes. Even so, the private right of action analysis is identical.

despite the fact that the treaty at issue did not create a private right of action. The approach that this Court has actually applied, which in practice amounts to a strong presumption in favor of judicial remedies for individuals whose treaty rights are violated, promotes U.S. compliance with its treaty obligations, and thereby helps avoid the international friction that would otherwise result from a breach of U.S. treaty obligations. In this way, the presumption in favor of judicial remedies helps realize the objective that the Framers sought to promote by including treaties in the Supremacy Clause – that is, to avoid situations where treaty violations lead to unwanted international conflicts. *See* Carlos M. Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1110 (1992) ("The Convention and ratification debates, and contemporaneous statements, show clearly that the Framers were concerned about treaty violations because they could provoke wars, deter other nations from entering into beneficial agreements with us, and adversely affect the nation's reputation.")

B. Cases Cited by the Oregon Supreme Court Are Consistent with the Presumption in Favor of Judicial Remedies

The Oregon Supreme Court relied on three U.S. Supreme Court decisions in support of its assertion that there is "a presumption against the creation of individual judicially enforceable rights" by means of treaties. *See State v. Sanchez-Llamas*, 108 P.3d 573, 575-77 (Or. 2005). The three cases are: *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580 (1884); and *Foster v. Neilson*, 27 U.S. 253 (1829). For the reasons noted above, *Foster* is consistent with a presumption in favor of judicial remedies for violations of individual treaty rights. *See supra* Part I.E.

In *Amerada Hess*, the plaintiff was not even raising a claim under a treaty. The plaintiff, a shipping company, alleged that Argentina had violated its right to engage in neutral shipping operations, which is protected under customary international law. *Amerada Hess*, 488 U.S. at 432. The Court rejected the claim on sovereign immunity grounds. *See id.* at 439-41. The plaintiff in *Amerada Hess* did invoke two treaties in support of its argument that the defendant, Argentina, had waived the sovereign immunity to which it might otherwise be entitled under the Foreign Sovereign Immunities Act. *See Amerada Hess*, 488 U.S. at 441-43. The Court, however, held that the subject treaties did not contain a waiver of sovereign immunity. *Id.* The Court mentioned in passing that the treaties "do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Id.* at 442. Given that the plaintiff did not base its right of action on a treaty, this statement is best read as an affirmation that the treaties cited did not waive the defendant's sovereign immunity because they did not specify that private parties could bring suit in U.S. courts to recover damages from foreign states.

Amerada Hess at most suggests that a defendant can overcome the presumption in favor of judicial remedies for violations of individual treaty rights by successfully raising a sovereign immunity defense. Neither respondent in the present case, though, is entitled to sovereign immunity. The State of Oregon cannot claim immunity because it is in the position of prosecutor in the *Sanchez-Llamas* case. And the State of Virginia cannot claim immunity because sovereign immunity is not a valid defense to a habeas corpus petition. *See* Larry W. Yackle, Federal Courts 313 (1999). Thus, *Amerada Hess* provides no support for respondents in this case.

Head Money Cases, 112 U.S. 580 (1884), also cited by the Oregon Supreme Court, actually supports a presumption *in favor of* judicial remedies for violations of individual treaty rights. In *Head Money Cases*, this Court drew a critical distinction between treaties that are "primarily a compact between independent nations," and treaties that "contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other." *Id.* at 598. In short, there is an important distinction between treaties that create primary rights for individuals and treaties that do not create such rights. If a treaty does not create primary rights for individuals, "its infraction becomes the subject of international negotiations and reclamations . . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id.* at 598. If, however, a treaty prescribes "a rule by which the rights of the private citizen or subject may be determined . . . [the] court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Id.*, at 598-99. In light of the cases discussed above, it is evident that the Court's reference to rules "by which the rights of the private citizen . . . may be determined" is a reference to primary rights, not private rights of action. Thus, *Head Money Cases* stands for the proposition that courts should enforce treaties on behalf of private individuals whenever the treaty prescribes a primary rule governing the rights of private individuals – that is, whenever the treaty protects primary individual rights.

III. INDIVIDUALS WHO ARE HARMED BY VIOLATIONS OF PRIMARY RIGHTS PROTECTED BY THE VCCR ARE ENTITLED TO JUDICIAL REMEDIES

For the reasons explained above, if a particular treaty provision is the Law of the Land under the Supremacy Clause, and it protects primary individual rights, then individuals who are harmed by a violation of their treaty-based primary rights are entitled to domestic judicial remedies, unless Congress has enacted legislation to preclude such remedies. There is no dispute that the VCCR is the Law of the Land. Although congressional amendments to the federal habeas statute may bar federal habeas review of some Vienna Convention claims, Congress has not enacted legislation to preclude state court remedies for violations of the VCCR. Therefore, individuals harmed by violations of their rights under Article 36 are entitled to judicial remedies in state courts.

A. Article 36 of the VCCR Protects Primary Individual Rights

For the purpose of this brief, an individual has a "primary right" under a treaty if a state party to the treaty has a legal duty under the treaty to behave in a particular way, or to refrain from behaving in a particular way, with respect to that individual. The question whether a state party has such a duty is a question of treaty interpretation. Courts look to the plain meaning of the text to determine the correct interpretation of a treaty. *See Geofroy v. Riggs*, 133 U.S. 258, 271 (1890). It is clear from the plain meaning of the treaty text that Article 36(1) of the VCCR grants primary rights to individuals. A foreign national arrested in the United States has a primary right "to communicate with and [have] access to consular officers of the sending State."

VCCR, art. 36, para. 1(a). The arrested foreign national also has a primary right to request that U.S. authorities "inform the consular post of the sending State" that he has been arrested, and U.S. authorities have a legal duty to honor such requests. VCCR, art. 36, para. 1(b). Moreover, the foreign national has a primary right to be informed "without delay" of his right of access to consular officers. *Id.* It is difficult to imagine how anyone could conclude, on the basis of this text, that Article 36 does not grant primary rights to individuals. The text of Article 36 is sufficiently clear that it is not necessary to resort to any supplementary means of treaty interpretation.

There is no doubt that petitioners' individual rights under Article 36 were violated. In *Sanchez-Llamas*, the Oregon Supreme Court admitted that "[t]he police did not inform defendant at that time, or at any time thereafter, that he had any right under Article 36 of the VCCR to communicate with the Mexican consulate." *Sanchez-Llamas*, 108 P.3d at 574. Since Sanchez-Llamas is a defendant in a criminal proceeding, he does not need to establish a right of access to court. Moreover, in accordance with the controlling Supreme Court precedent discussed above, he has the power to invoke the VCCR in a domestic court if he was harmed by the violation of his treaty rights. Therefore, the only significant question in his case is whether he was harmed, and if so, what is the appropriate remedy.

In *Bustillo*, the United States has conceded that petitioner's Vienna Convention rights were violated. *See Bustillo*, Petition for a Writ of Certiorari, at 3. Virginia's habeas corpus statute granted Mr. Bustillo a right of access to state court to pursue his habeas petition. *See* Va. Code § 8.01-654. Moreover, in accordance with controlling Supreme Court precedent, he had the power to invoke the VCCR in a Virginia court if he was harmed by the violation

of his treaty rights. Nevertheless, the State of Virginia claims that state procedural default rules prevent Mr. Bustillo from raising a VCCR claim in his state habeas petition. The next section of this brief addresses that argument.

B. The State of Virginia May Not Invoke Procedural Default Rules if Doing So Would Contravene U.S. Treaty Obligations

In *Avena and Other Mexican Nationals* (Mexico v. United States), 2004 ICJ 128 [hereinafter, *Avena*], the International Court of Justice held that the United States has an international obligation under Article 36(2) of the VCCR to provide review and reconsideration, *by means of a judicial proceeding*, of the convictions and sentences of individuals whose rights under Article 36(1) of the VCCR have been violated. *See id.* at ¶¶ 138-43. This brief assumes that the ICJ's decision in *Avena* constitutes a correct interpretation of Article 36(2). Given this interpretation, the question arises as to which actor or actors in the domestic legal system have the authority to choose to violate U.S. obligations under Article 36(2). In other words, under the U.S. constitutional system, who has the constitutional authority to decide not to provide the judicial review required by Article 36(2)?

There is no doubt that Congress has the constitutional authority to enact legislation to preclude the type of judicial review required by Article 36(2). Such legislation would be a violation of the United States' international obligations, but it would supersede the treaty for purposes of domestic law. *See* Restatement (Third) of the Foreign Relations Law of the United States § 115(1)(a). State courts, however, unlike Congress, do not have the constitutional authority to decide to violate U.S. treaty obligations. Moreover, if a state court with jurisdiction over a relevant case denies "review and reconsideration" to an individual who has been convicted and

sentenced to severe penalties after having been deprived of his rights under Article 36(1), the court itself commits a violation of Article 36(2). *See Avena*, ¶¶ 138-41. Since courts lack the constitutional authority to choose to violate U.S. treaty obligations, every judicial decision refusing to provide review and reconsideration is a judicial act in excess of that court's constitutional authority, unless that treaty violation has been authorized by Congress.

The present case is readily distinguishable from cases where state procedural default rules bar a state habeas remedy for an individual whose federal constitutional rights were violated. The U.S. Constitution does not contain any provision that prohibits state governments from applying procedural default rules to bar remedies for individuals whose federal constitutional rights were violated. (If the Constitution did contain such a provision, then states could not apply procedural default rules to bar federal constitutional claims.) Article 36(2) of the VCCR, however, does prohibit state governments from applying procedural default rules to bar remedies for individuals whose primary rights under Article 36(1) were violated, at least in cases where those individuals were "convicted and sentenced to severe penalties."[6] Since the VCCR is Law of the Land under the Supremacy Clause, it preempts state procedural rules insofar as application of those rules would contravene U.S. treaty obligations.

The present case is also readily distinguishable from *Breard v. Greene*, 523 U.S. 371 (1998). In *Breard*, this

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[6] In *Breard v. Greene*, 523 U.S. 371 (1998), this Court expressed the view that the VCCR did not preclude application of domestic law procedural default rules. This interpretation of the VCCR, rendered without the benefit of briefing on the merits, has since been rejected by the ICJ. *See Avena*, ¶¶ 138-41.

Court, in denying discretionary relief, expressed the view that petitioner's federal habeas petition alleging violations of the VCCR was barred, *inter alia*, by the Antiterrorism and Effective Death Penalty Act, a federal statute enacted long after the U.S. ratified the VCCR.[7] *See id.* at 376. Under the last-in-time rule, a later-in-time federal statute takes precedence over an earlier-in-time treaty, insofar as there is an unavoidable conflict between the two laws. *See* Restatement (Third) of the Foreign Relations Law of the United States § 115(1)(a). Therefore, if a treaty requires "review and reconsideration," but a later-in-time federal statute precludes federal habeas review, the statute takes precedence over the treaty as a matter of domestic law, insofar as petitioner is seeking federal habeas review. The present case, however, involves the application of a state procedural default rule. If there is an unavoidable conflict between a treaty and a state statute or rule, the treaty always takes precedence over state law because the Supremacy Clause says so. U.S. Const. art. VI, cl. 2. Thus, in contrast to Congress, state legislatures do not have the constitutional power to authorize application of procedural default rules in cases where application of such rules would contravene U.S. treaty obligations.

This construction of the Supremacy Clause promotes the central purpose underlying the Framers' decision to include treaties in the Supremacy Clause. Under the Articles

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[7] This Court also said in *Breard* that Paraguay's claim against the Governor of Virginia was barred by the Eleventh Amendment, *id.* at 377-78, and that Paraguay did not have a private right of action to bring its claim in U.S. courts. *Id.* at 377-78. It is noteworthy, though, that the Court did not say that the Eleventh Amendment barred Breard's individual claim, or that Breard himself lacked a private right of action. This reinforces the point that neither of these objections bars Mr. Bustillo's claim.

of Confederation, states were routinely violating U.S. treaty obligations, and the federal government was powerless to halt those violations. *See* Vazquez, *Treaty-Based Rights*, 92 COLUM. L. REV. at 1101-04. The Framers' solution to this problem, embodied in the Supremacy Clause, was to give treaties the status of federal law, and to make treaties directly binding on judges in state courts. *See id.* at 1104-10. *See also* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2120-26 (1999). In recent years, state governments have routinely violated U.S. obligations under Article 36(1) of the VCCR, just as state governments violated U.S. treaty obligations before adoption of the Constitution. This court can solve that problem, and halt ongoing violations of Article 36(1), by ruling that state courts may not apply procedural default rules in cases where application of such rules would deprive individual foreigners of the judicial review and reconsideration required by Article 36(2). If this Court fails to issue such a ruling, state officers will continue to violate Article 36(1) of the VCCR, thereby perpetuating the problem that the Supremacy Clause was intended to rectify.

Finally, it bears emphasis that the United States can fulfill its treaty obligations under the VCCR by ensuring the availability of habeas relief in state courts, because the VCCR does not require a federal habeas remedy for treaty violations if a state remedy is available. Therefore, this Court can avoid any conflict between the VCCR and federal habeas law by ruling that state procedural default rules must yield to the treaty in cases where application of such state rules would contravene Article 36(2).

CONCLUSION

For the reasons noted above, this Court should hold that every individual who has been harmed by a violation of his primary rights under Article 36(1) of the VCCR is entitled to a judicial remedy for that violation, except insofar as congressional amendments to the federal habeas statute enacted after ratification of the VCCR limit the availability of federal habeas relief. Additionally, Article 36(2) of the VCCR requires state courts in Virginia to provide review and reconsideration of Mr. Bustillo's case, and state courts may not apply procedural default rules to bar the judicial review required by the treaty.

Respectfully submitted.

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* Institutional affiliations are provided solely for purposes of identification, and do not imply institutional endorsement of the substantive views presented in this brief.

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Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

THE STATE OF OREGON

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) AND THE LAW COUNCIL OF AUSTRALIA (LCA) AS *AMICI CURIAE* IN SUPPORT OF PETITIONER MOISES SANCHEZ-LLAMAS

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation whose membership of more than 11,000 regular members and 25,000 affiliate members include lawyers from every state. NACDL is the only national bar organization working exclusively on behalf of public and private criminal defense lawyers and their clients. The American Bar Association recognizes the NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL members are in daily contact with the criminal justice system, representing individuals in both state and federal courts. NACDL works domestically and internationally to ensure justice and due process for persons accused of crime; to foster the integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice.

Representing some 40,000 legal practitioners across the country, the mission of the Law Council of Australia (LCA) includes representing the legal profession at the national level and promoting the administration of justice, access to justice and general improvement of the law. The LCA advises governments and courts on ways in which the law and the justice system can be improved for the benefit of the community. It is a member of several international legal organizations, including the International Bar Association (IBA) and the Commonwealth Lawyers Association (CLA).

SUMMARY OF ARGUMENT

The private and justiciable rights under Article 36 to the Vienna Convention on Consular Relations (VCCR) compel

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[1] Counsel for all parties have consented in writing to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the amici, has made a monetary contribution to the preparation of this brief.

the recognition and enforcement of appropriate remedies. Federal statutes, like treaties, are often silent with regard to remedies. Nevertheless, the absence of specific remedial language in a treaty or statute has never deterred this Court from providing appropriate remedies for violations of individual rights. Indeed, United States courts have suppressed evidence as a remedy for a wide variety of both constitutional and statutory violations, particularly when the violation has the potential to impair the integrity of the justice system.

Compliance with Article 36 provides critical protections for detained foreign nationals who are disoriented, confused and isolated in an unfamiliar legal system. Consular notification allows foreign nationals to access a vital support system that enables them to become full participants in the criminal process. Foreign defendants can participate in their own defense only when they are fully informed of their rights, are provided with competent interpreters, and are able to communicate effectively with attorneys and court personnel. Yet when foreign nationals are deprived of their rights to consular notification and access, these essential attributes of the fair administration of justice are undermined. For this reason, suppression is an entirely appropriate remedy for Article 36 violations.

But suppression of incriminating statements is an appropriate remedy for another reason, as well. The availability of suppression as a remedy for Article 36 violations will simultaneously increase compliance with the treaty's provisions on consular notification and access and deter law enforcement officers from ignoring their obligations under the treaty. Allowing for the discretionary suppression of statements thus promotes good police practices which, in turn, advance the integrity of criminal proceedings.

For these very reasons, other common law jurisdictions

have recognized that suppression of statements is an appropriate remedy for Article 36 violations. In at least three cases, Australian courts have applied suppression or exclusion as the remedy for breaches of consular communication rights. Courts in the United Kingdom have likewise concluded that the failure to inform detained foreigners of their consular rights warrants the discretionary remedy of exclusion.

ARGUMENT

I. Individual Treaty Rights Compel the Recognition and Enforcement of Appropriate Remedies

There is ample and uncontrovertable evidence that detained foreign nationals have individual rights under Article 36 of the Vienna Convention on Consular Relations.[2] Given the existence of those rights, United States courts must be empowered to provide adequate remedies for their violation.[3]

It is neither surprising nor significant that the VCCR does not define a remedy for a breach of its provisions, for it is commonplace for "substantive rights [to] be defined by [treaty] but the remedies for their enforcement left undefined

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[2] Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 34 U.N.T.S. 262.

[3] Other briefs submitted to this Court explain in detail why Article 36 must rightfully be construed as conferring individual rights, a position that the *amici* fully support. *See, e.g.*, Brief for Petitioner, *Bustillo v. Johnson* (No. 05-551); Brief for Petitioner, *Sanchez Llamas v. Oregon* (No. 04-10566); Brief Amicus Curiae of the Association of the Bar of the City of New York in Support of Petitioners.

or relegated wholly to the states."[4] This Court has recognized as much. In construing self-executing treaties that confer rights on foreign nationals, the Court has neither sought nor required specific remedial language before fashioning appropriate remedies for violations of those treaty-based rights. *See, e.g., Kolovrat v. Oregon*, 366 U. S. 187 (1961); *Asakura v. Seattle*, 265 U. S. 332 (1924); *Hauenstein v. Lynham*, 100 U.S. 483 (1879).[5]

Under international law, the recognized remedy for a treaty violation is to restore the *status quo ante* by "wip[ing] out all the consequences of the illegal act and reestablish[ing] the situation which would, in all probability, have existed if that act had not been committed." RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 901 (1987). *See also* IAN BROWNLIE, STATE RESPONSIBILITY 210 (1983) (nullity is the necessary outcome of illegality in international law). The United States has acknowledged this international law of remedies as a customary rule. Memorial of the United States, *Tehran Hostages Case*, 1980 I.C.J. Pleadings at 188 ("It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an

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[4] Carlos Manuel Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1144 (1992) (quoting Hart & Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 533 (1988). *See also Factory at Chorzow*, 1927 P.C.I.J. (ser. A) no. 9, at 21.

[5] Significantly, none of the treaties addressed in these cases specified a particular remedy for the breach of their rights-conferring provisions. *See also Medellin v. Dretke*, 125 S.Ct. 2088, 2104 (2005)(O'Connor, Stevens, Souter, Breyer, JJ., dissenting) (language of other treaties found to confer individual rights on foreign nationals "is arguably no clearer than the Vienna Convention's is, and they do not specify judicial enforcement."). *See also Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994) (invalidation of an immigration proceeding for a breach of consular notification is an available remedy "upon a showing of prejudice to the rights sought to be protected by the subject regulation.").

adequate form.") (quoting *Factory at Chorzów*, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21); *cf. Avena and Other Mexican Nationals, (Mex. v. U.S.)*, 2004 I.C.J. 128 (March 31, 2004), ¶ 119 ("*Avena*") (remedy for a treaty violation is reparation in adequate form "that corresponds to the injury"). This principle is in no way controversial, for as the U.S. argued in *Tehran Hostages* "Reparation . . . is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the [Vienna] Convention itself." *Id.*

Acting in conformity with these long established principles, the International Court of Justice (ICJ) recently held that the United States was required to provide a judicial remedy for Article 36 violations in the cases of Mexican nationals facing severe penalties or prolonged incarceration. *Avena* ¶ 153(11) (United States must allow review and reconsideration of affected nationals' convictions and sentences "so as to allow full weight to be given to the violation of the rights set forth in the convention"). In doing so, the ICJ called upon the United States courts to determine whether the remedy of suppression would be appropriate under the concrete circumstances of each case in which the authorities had violated their obligations under Article 36, and the defendant was sentenced to a severe penalty or prolonged incarceration. *Avena* ¶ 127.

II. Suppression is a Time-Honored Remedy for Violations of Procedural Rights Essential to the Fair Administration of Justice

Suppression as a remedy has been provided for a wide variety of both constitutional and statutory violations. Federal statutes, like treaties, are often silent with regard to remedies that flow from their violation. Nevertheless, courts have not hesitated to impose sanctions for statutory

violations in appropriate cases.[6]

A. Suppression Has Long Been Required for Willful Violations of Non-Constitutional Procedural Rules

In *McNabb v. U.S.*, 318 U.S. 332, 345 (1943), this Court overturned a conviction where a statement was taken in violation of a procedural rule requiring prompt appearance before a magistrate, reasoning that the convictions could "not be allowed to stand without making the courts themselves accomplices in willful disobedience of law." In doing so, this Court explicitly expanded the remedy of suppression beyond those situations protecting a right "derived solely from the Constitution." *Id.*, at 341; *see also Upshaw v. United States*, 335 U.S. 410, 413 (1948). *Upshaw*, like *McNabb*, involved deliberate police misconduct in flouting a procedural rule. 335 U.S. at 414. In both instances, suppression was deemed necessary because the courts would be tainted by the police misconduct if the statements were admitted.

The rule adopted in *McNabb* was clarified in *Mallory v. United States*, 354 U.S. 449 (1957). *Mallory* found a confession to be inadmissible when obtained in violation of Federal Rule of Criminal Procedure 5(a), which mandated that the defendant be brought before a committing magistrate "without unnecessary delay." The Court stressed the role of

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[6] *See, e.g., United States v. Doe*, 170 F.3d 1162, 1168 (9th Cir. 1999) (suppression may be warranted where violation of Juvenile Protection Act not harmless beyond a reasonable doubt); *United States v. Marts*, 986 F.2d 1216, 1218-19 (8th Cir. 1993) (exclusionary rule applies to statutory knock and announce rule); *United States v. Rivieccio*, 919 F.2d 812, 816 (2d Cir. 1990) (suppression appropriate remedy for misuse of immunized testimony); *United States v. Chemaly*, 741 F.2d 1346, 1353-54 & n.2 (11th Cir. 1984) (suppression appropriate where warrant statute violated); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 893 n.2 (9th Cir. 2000) (Thomas, J., dissenting) (collecting cases where suppression provided for non-constitutional violations).

timely warnings and the intervention of a third party designed to safeguard an unknowledgeable and susceptible defendant from overzealous police. 354 U.S. at 455. The resulting *McNabb-Mallory* rule was used to suppress voluntary statements because to do otherwise would undermine confidence in the fair administration of justice. 354 U.S. at 456. [7]

B. Suppression is Available for Prejudicial Violations of Statutory Rights That Provide Access to Meaningful Support and Counsel

Individual rights under the VCCR are on par with rights created by federal statute. *Breard v. Greene*, 523 U.S. 371, 376 (1998), quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality). In addressing violations of the statutory right to parental notification under the Juvenile Delinquency Act (JDA),[8] some lower courts have applied reasoning that is strikingly reminiscent of the concerns that animated the drafters of Article 36 to enshrine the rights to consular notification and access. *See, e.g. United States v. Doe*, 701 F.2d 819, 822 (9th Cir. 1983) (requiring consular notification to protect the rights of unaccompanied foreign juveniles); *see also Doe II*, 862 F.2d 776, 780-81 (9th Cir. 1988). While the Ninth Circuit has not automatically suppressed statements taken in violation of the JDA, it has held that suppression may be warranted where the violation is not harmless beyond a reasonable doubt. *Doe IV*, 170 F.3d 1162, 1168 (9th Cir. 1999).

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[7] Congress altered this rule through the Omnibus Crime Control and Safe Streets Act of 1968 to deny suppression solely on the grounds of unreasonable delay, dispute among courts still exists as to the extent that delay may be used to suppress a statement. *See United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994).

[8] 18 U.S.C. 5033. Section 5033 states that "the arresting officer . . . shall immediately notify . . . the juvenile's parents, guardian, or custodian of such custody."

The Ninth Circuit's assessment of harm in these cases is closely linked to its assessment that juveniles are an inherently vulnerable class of defendants. This Court has likewise recognized the crucial importance of "counsel and support" during interrogation for particularly vulnerable individuals, such as juveniles, who are more likely "to become the victim[s] first of fear, then of panic." *Haley v. Ohio*, 332 U.S. 596, 600 (1948). Detained foreign nationals are similarly susceptible to fear and manipulation, both of which are compounded by the language barriers they often face. As one commentator has observed, language, culture and separation from family

> creates an aura of chaos surrounding a detained or arrested foreign national, and inevitably leads to diminished protection of rights critical from arrest onwards. Article 36 of the Convention protects against these problems by allowing detained foreign nationals to contact and confer with a member of their state's consulate.

Linda A. Malone, *From Breard to Atkins to Malvo: Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty* (hereafter MALONE), 13 WM. & MARY BILL RTS. J. 363, 392-93 (2004).

Due to the inherent vulnerability of detained foreign juveniles, and their "exacerbated sense of isolation and helplessness" the Ninth Circuit has held that officers must "delay interrogation of the juvenile for a reasonable time to allow consular notification and response." *United States v. Juvenile (RRA-A)*, 229 F.3d 737, 746 (9th Cir. 2000) (Suppression warranted for failure to contact consulate before questioning). Notably, the JDA specifies no remedies for its breach. Like the equivalent notification obligation under Article 36, the cure for non-compliance with the JDA stems from a basic recognition that "access to meaningful support and counsel" are the touchstone of any adequate

advisement of rights. *Juvenile RRA-A*, 229 F.3d at 746; *see also Marbury v. Madison*, 5 U.S. 137, 163 (1803) (U.S. law must furnish a remedy for the violation of a vested legal right).

C. Suppression Has Been the Historical Remedy for Statements of Questionable Reliability

The Fifth Amendment privilege against compulsory self-incrimination existed for more than one hundred years before it served as a basis for suppression of an incriminatory statement in federal court proceedings in *Bram v. U.S.*, 168 U.S. 532 (1897). Approximately seventy years later, in *Miranda v. Arizona*, 384 U.S. 436 (1966), this constitutional provision served as the basis for the Court's historic ruling regarding the suppression of statements in state criminal proceedings.

But even before *Bram* and *Miranda*, suppression of statements was the preferred remedy in the United States and Britain to protect defendants from convictions based upon unreliable confessions secured through improper means. *See, e.g.*, Israel, Kamisar & LaFave, CRIMINAL PROCEDURE AND THE CONSTITUTION 311 (2004). While suppression analyses were often couched in terms of "voluntariness," courts have long been more concerned with the trustworthiness or reliability of statements obtained by the police. *See Bram*, 168 U.S. at 543 (*quoting* 3 Russ. Crimes (6th Ed.) 478) (reliability of a confession can be affected by "any sorts of threats or . . . any direct or implied promises, however slight").

In 1936, this Court for the first time invoked the Fourteenth Amendment's due process clause to condemn coercive interrogation practices by the States. *See Brown v. Mississippi*, 297 U.S. 278 (1936). Noting that interrogation is a fundamental component of the process through which a state secures a criminal conviction, the *Brown* Court applied

a federal due process analysis to state criminal prosecutions. The conduct of interrogations by state law enforcement officers thereby became subject to analysis and potential invalidation under the Fourteenth Amendment.

Voluntariness continued to be the lens through which interrogations were inspected, despite the sharp drop in physically abusive interrogations following *Brown*. By 1960, this Court acknowledged that the "voluntariness" analysis was really a shorthand way of invalidating confessions that were obtained in a manner which offended a "complex of values." *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960). This "complex of values" required suppression of statements that were either (1) untrustworthy, (2) obtained by offensive police practices, or (3) obtained under circumstances in which the defendant's free choice was significantly impaired.[9] *See* LAFAVE ET. AL., CRIMINAL PROCEDURE §6.2(b) (4th ed. 2000).

A totality of the circumstances test was adopted to assess this more complex notion of voluntariness, requiring the courts to carefully assess the actions of police during interrogations.[10] However, as it has in other contexts, the totality of the circumstances test has often proven imprecise and incapable of uniform application. Due to this imprecision, courts and other actors in the criminal justice system sought out clearer rules for suppression that would deter police misconduct while decreasing the problem of unreliable confessions.

D. Strict Adherence to Warnings and Adequate Advisement of Rights are Essential to Ensure the

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[9] This third goal was effectively undermined if not eliminated by the Court fifty years after *Brown* in *Colorado v. Connelly*, 479 U.S. 157 (1986) (invalidated suppression as a remedy in the absence of police misconduct).

[10] *See Haynes v. Washington*, 373 U.S. 503 (1963).

Reliability of Statements and Police Respect for Binding Legal Obligations

Miranda changed the law significantly, but not the underlying rationale for suppression. First, it articulated a Fifth Amendment right to counsel, whose purpose was to ensure that the defendant was not kept in isolation and subjected to coercive tactics. 384 U.S. at 448-49, 465. The second significant change adopted by *Miranda* was that henceforth police officers would be required to warn a criminal defendant of the constitutional rights to remain silent, to have an attorney appointed if the defendant could not afford one, and to have an attorney present during questioning. *Id.* at 473-74. If a statement is taken outside the presence of an attorney, a "heavy burden" falls upon the prosecution to prove that the rights to be free from self-incrimination and the right to counsel were knowingly and intelligently waived. *Id.* a 475. This heavy burden creates a presumption in favor of suppression when statements are taken without warnings and waivers. *Id.*

Miranda tied the required warnings and the presumption in favor of suppression very strongly together. Statements obtained during custodial interrogation in violation of the dictates of *Miranda* are presumed involuntary and will be suppressed. Following *Miranda*, suppression has been tied more strongly to a violation of the warnings than it is to the underlying right.

> No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

Id. at 471-72. In so articulating these rights, the Court held that suppression is warranted for a violation of the warning, even if the defendant was actually aware of his underlying

rights. With this decision, this Court embraced a rule that clarified the rights and obligations of defendants and law enforcement personnel alike. Through their adoption of this rule, the Court sought to establish an identifiable mechanism for determining whether police misconduct had occurred, as well as a means for curbing that misconduct. *Id.* at 448-49. In addition, the Court hoped to marshal an aid in determining whether a defendant's statement was voluntary and reliable. *Id.* at 463, n. 33.

III. Non-Compliance With Article 36 Undermines the Integrity of Criminal Proceedings

The *Miranda* decision and its progeny have in no way eliminated the underlying purposes of suppression. Suppression still serves the purposes of curbing police misconduct during interrogations and ensuring that only reliable statements are admitted into evidence. These purposes are equally served by suppressing statements taken by law enforcement officers who have failed to notify a defendant of his Article 36 rights "without delay."

Foreign nationals are particularly susceptible to coercive interrogation tactics. Many, if not most foreign nationals, like Mr. Sanchez-Llamas, confront linguistic and cultural barriers that not only impede their understanding of their rights under a foreign system of law, but can lead to false confessions. *See* Brief Amicus Curiae of the Government of the United Mexican States in Support of Petitioner ("Mexico Amicus") at 12. It is the

> obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer--to the

> untrained layman--may appear intricate, complex, and mysterious.

Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938). To a detained foreign national, the myriad rules that govern the prosecution of serious criminal cases are not merely complex and mysterious – they are unfathomable. As other *amici* have noted, foreign criminal justice systems differ fundamentally from one another, both in their formal rules and in their practical operation. *See* Mexico Amicus at 10-11. For example, the right to remain silent is anathema to the inquisitorial systems of justice predominant in much of the world, which rely upon evidence from the defendant to obtain convictions. *See* Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Toward an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 406-07 (1994). Negative inferences can be drawn from any attempt to remain silent in the face of official questioning about a crime. The cultural norm of cooperating with questioners is particularly strong in those countries with dominant Catholic traditions, for the inquisitorial method derives from the ecclesiastical courts. *Id.* at 410-11.

Consular notification allows the national to avail himself of the assistance of consular officials who can explain the differences between his home country and the United States, including such fundamental concepts as the right to remain silent, the notion that statements to the police can be used as evidence in a court of law, the right to appointed counsel, the role of a public defender, the nature of criminal charges and the penalty that can be imposed after a conviction, the role of plea bargaining, and the adversarial system of law. Consular officers can even provide lawyers for defendants. *See* Mexico Amicus at 12-13.

For these reasons, the Inter-American Court on Human Rights has determined that Article 36 serves to protect an

inherently vulnerable group of detainees. *See* The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999) at ¶122 (recognizing that the individual right to consular notification is "among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial"). The court observed that the provisions of Article 36 reflected a "shared understanding that the right to information on consular assistance is a means for the defense of the accused that has repercussions –sometimes decisive repercussions- on enforcement of the accused's other procedural rights." *Id.* ¶ 123.

The peculiar difficulties experienced by a foreign national accused of a crime make it exceedingly unlikely that *Miranda* warnings will suffice to protect foreign nationals' rights and preserve the integrity of our domestic courts:

> [F]oreign nationals are particularly prone to succumbing to interrogation techniques aimed at encouraging them to confess. . . Foreign nationals may have particular difficulty understanding the right to remain silent when it is explained to them by a police officer [who is interrogating them]. . . . [T]he VCCR assumes that foreign nationals may benefit from consular assistance and requires the detaining authorities to facilitate this assistance.

John Quigley, *Suppressing the Incriminating Statements of Foreigners*, 13 WM. & MARY BILL RTS. J. 339, 340-41 (2004).

Article 36 serves as a safeguard to ensure that foreign nationals have the support of individuals who can orient

them to the bewildering array of rules that govern the United States criminal justice system. The provisions of Article 36(1)(b) set forth clear and easily enforced rules that promote the integrity of the judicial process and help prevent unreliable statements by defendants who do not understand their interrogators. In short, Article 36 promotes many of the same goals as the procedural rules whose violation led the Court to suppress custodial statements in *McNabb* and *Mallory*.

Moreover, Article 36 provides foreign defendants with the right to seek the assistance of consular officers who are empowered to assist them in obtaining legal representation at a critical juncture in their criminal prosecution. In this manner, consular officers serve much the same function as parents of detained juveniles – and the authorities' failure to enforce the rights of consular notification and access should be treated in the same manner as the Ninth Circuit addressed violations of the Juvenile Protection Act in *United States v. Juvenile (RRA-A)*, 229 F.3d at 746.

IV. Suppression is Essential to Ensure Compliance with Article 36

Thirty-six years after the United States ratified the Vienna Convention, state actors still openly resist enforcing the treaty, rejecting the authority of the International Court of Justice and claiming that they cannot be held responsible for violations of Article 36. *See, e.g.*, Valencia et al., *Avena and the World Court's Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas's Independence From the World*, 23 YALE L. & POL'Y REV. 455, 456-57 (2005) (quoting spokesman for Texas Governor Rick Perry as stating, "Obviously the governor respects the world court's right to have an opinion, but the fact remains they have no standing and no jurisdiction in the state of Texas.") The ongoing reluctance of state law enforcement officers to comply with their obligations to enforce the treaty's

provisions argues strongly in favor of suppression. Only by providing remedies for Vienna Convention violations will courts ensure future compliance with the United States' binding treaty obligations.

A. Other Parties to the Vienna Convention Provide Judicial Remedies such as Suppression for Violations of Individual Consular Rights

The lower court in this case concluded that suppression is never available for a breach of Article 36 rights, relying largely on the State Department's assertion that "the [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *State v. Sanchez-Llamas*, 108 P.3d 573, 578 (Or. 2005) (citing *United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000)). The lower court likewise relied upon the State Department's claim that "no other signatories to the Vienna Convention have permitted suppression under similar circumstances." *Sanchez-Llamas*, 108 P.3d 573, 578. Both claims are incorrect as a matter of law. As to the first, the ICJ has clearly held that the United States must provide a judicial remedy for Article 36 violations in cases involving severe penalties or prolonged incarceration. *Avena* ¶¶ 121, 122, 127, 140-41. As to the second, both the lower court and the State Department overlooked decisions from Australia and the United Kingdom in which courts have excluded incriminating statements or evidence after finding that the authorities neglected to notify foreign detainees of their consular rights.

1. Australian Courts Exclude Evidence to Remedy Violations of Individual Consular Rights

The Australian government has codified its Article 36 obligations in Part 1(C), Section 23P, of the *Crimes Act*

1914.[11] Under Section 23P, federal police must advise detained foreigners of their right to consular notification prior to any interrogation and must then notify the consulate upon request, allowing the detainee a "reasonable time" and facilities to communicate with the consulate. In addition, "an investigating official must not start to question the person" until these requirements have been met.[12] At least three Australian states (Victoria, New South Wales and Queensland) have similar legislation requiring investigating officers to advise suspects who are foreign nationals of their right to consular communication before any questioning commences, to provide "reasonable facilities" to allow them to communicate with their consulate and to defer questioning for a reasonable period of time until that contact has taken

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[11] Few nations follow the American legal doctrine of treaty self-execution, requiring instead that a ratified treaty must be given domestic effect by separate executive or legislative implementation. See *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (general rule that a treaty "is carried into execution by the sovereign power of the respective parties" but that in the United States "a different principle is established" under the Supremacy Clause, whereby a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."); cf. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287 per Mason CJ and Deane J ("It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute.)" One must therefore look to foreign judicial decisions enforcing the enabling statutes to discover the true scope of judicial remedies afforded for violations of Article 36 rights by other parties to the VCCR.

[12] Although the *Avena* judgment found that Article 36(1)(b) "cannot be interpreted to signify that the provision of such [consular rights] information must *necessarily* precede any interrogation," it is important to note that the treaty is required to be enforced through the laws of the receiving state, and those laws are required to give the treaty its full effect. *Avena* ¶ 87(emphasis added). This is precisely what Australia has done.

place.[13] These state and federal legislative provisions were enacted pursuant to Australia's view of its binding international legal obligations under article 36(1)(b).[14]

At common law in Australia, judges have the discretionary power to exclude unlawfully obtained evidence. *See Bunning v Cross* (1978) 141 CLR 54, 72 (per Stephen & Aickin JJ) (citing *R v Ireland* (1970) 126 CLR 321). Courts may exclude confessions in the exercise of either their "public policy" discretion[15] or a more general "unfairness" discretion.[16] The unfairness discretion focuses on the effect of the unlawful or improper conduct on the accused and is designed to protect his rights and privileges;

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[13] *See* CRIMES ACT 1958 (Vic), s.464F; LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 (NSW); POLICE POWERS AND RESPONSIBILITIES ACT 2000 (Qld), s.261.

[14] *See* LAW REVIEW COMMISSION OF NEW SOUTH WALES, REPORT 66 (1990) - CRIMINAL PROCEDURE: POLICE POWERS OF DETENTION AND INVESTIGATION AFTER ARREST, para. 5.43 and fn. 81, at http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R66CHP5 (citing para. 6.12 of the Gibbs Committee Review of Commonwealth Criminal Law of 1991); THE GILBERT AND TOBIN CENTRE OF PUBLIC LAW, *Submission made to Parliamentary Joint Committee on ASIO, ASIS and DSD on Questioning and Detention Powers* (March 24, 2005), p. 10, http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/subs/sub55.pdf.

[15] The public policy discretion involves weighing the interest in a conviction against "the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion." *Ireland*, 126 CLR at 335 (per Barwick, J.)

[16] *Cleland v. R* (1982) 151 CLR 1. The unfairness discretion has operated long before the public policy discretion. See *McDermott v. The King* (1948) 76 CLR 501, 512-3 (per Dixon J.). It operates where "by reason of the manner of the investigation, it is unfair to admit evidence of the confession, whether because the reliability of the confession has been made suspect or for any other reason, that evidence should be excluded." *Duke v The Queen* (1989) 180 CLR 508 at 513 (per Brennan CJ).

the public policy discretion focuses on constraining law enforcement authorities so as to prevent them from engaging in illegal or improper conduct and is designed to further the public interest.[17]

In at least three cases, Australian courts have applied suppression or exclusion as the remedy for breaches of, *inter alia*, consular communication rights.[18] In these cases, the Australian courts have given careful consideration to the assistance consular officers can provide:

> Contacting the consular office by a detained foreign national provides an opportunity to report his or her circumstances, seek advice and assistance, provides a means of informing relatives and friends of his or her situation and all this in his or her native language. One need only contemplate the predicament of an Australian national held in custody in a foreign non-English speaking country without access to an Australian consular office to appreciate the importance of the right . . .

Tan Seng Kiah, [2002] NTCCA 1 at 49. The *Tan Seng Kiah* court also emphasized that timely access to consular assistance is an independent right, for which the provision of legal counsel or an interpreter is not a substitute:

> These rights are part of the statutory scheme introduced to provide protection to people detained by police. . .The right to consult a legal practitioner

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[17] *Foster v The Queen* (1993) 67 ALJR 550, 554; 113 ALR 1 at 6-7. The High Court has begun to synthesize these two related and overlapping discretions. *See R v Swaffield* (1998) 192 CLR 159, 194-5.

[18] *See R. v. Tan* [2001] WASC 275 (W. Austl. Sup. Ct.); *R v Su* [1997] 1 VR 1 (Sup. Ct. Vic.); *Tan Seng Kiah v R.*. [2000] 10 NTLR 128 (N. Terr. Ct. Crim. App.) (Austl.); *see also Foo v. The Queen* [2001] NTCCA 2 (N. Terr. Ct. Crim. App.) at 44.

> or to attempt to do so and the right to contact the consular office or to attempt to do so are rights independent of the right of access to an interpreter. They are rights available to be enjoyed "as soon as practicable".

Id. at 51. Finding that the defendant might have declined to give a statement if he had been permitted to exercise his rights under section 23P, the court suppressed his statement. *Id.* at 72.

2. Courts in the United Kingdom Have Granted Suppression to Remedy Consular Rights Violations

"The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries." *Roper v. Simmons*, 125 S.Ct. 1183, 1199 (2005). The rules governing apprehension, arrest, detention, questioning and other custodial issues in England and Wales are set down in the U.K. Police and Criminal Evidence Act of 1984 (PACE). The act is supplemented by the Codes of Practice, which give practical guidance in the treatment of suspects, prisoners and defendants.[19] As provided for in Code C, paragraph 7.1, detained foreign nationals must be informed "as soon as practicable" of their right to communicate with their consulate at any time, as well as their right to have their consulate notified of the detention. Under paragraph 7.3, consular officers "may visit one of their nationals in police detention to talk to them and, if required, to arrange for legal advice." Paragraph 7.5 requires that a record be made "when a detainee is informed of their rights under this section and of any communications" with an embassy or consulate.[20]

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[19] The Codes of Practice are available at: http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/pace-codes.html.

The language and intent of these provisions is remarkably similar to U.S. regulations and operational policies governing the arrest or detention of foreign nationals by federal agencies. *See* 8 C.F.R. 236.1(e) (Department of Homeland Security); 28 C.F.R. 50.5(a) (Department of Justice); *see also* Internal Revenue Manual, part 9.4.12.9, (placing the onus on "the arresting agent" to "promptly inform" foreign detainees of their consular rights and "to ensure that notification is immediately given" to the nearest consulate). As in the federal regulations, the procedure to be followed under the PACE Code is explicit and mandatory. In both countries, the mandated procedures closely adhere to the plain language of Article 36.

Although the Code of Practice does not expressly require the suspension of an interrogation pending consular notification, courts in the United Kingdom have concluded that the failure to inform detained foreigners of their consular rights warranted the discretionary remedy of exclusion. Suppression of custodial statements has been ordered even where the foreign suspects were advised of and waived their right to counsel.[21] *R. v. Bassil and Mouffareg* (1990) 28

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[20] The explanatory n for this section declares: "The exercise of the rights in this section may not be interfered with" even in cases where a detainee may be otherwise held incommunicado, such as suspects detained under the *Terrorism Act 2000*.

[21] According to a State Department submission to the *Avena* Court, other parties to the VCCR have likewise adopted specific requirements to safeguard the individual rights enshrined under Article 36, such as Denmark's practice of informing the detained person of "his rights to remain silent and to contact his consulate; if the detainee at this point does not wish the interrogation to continue it will be stopped until consular notification is provided." *See* 2 Counter-Memorial of the United States of America (Mex. v. U.S.), Annex 4 at A384, note 7, (Nov. 3, 2003). In New Zealand, "law enforcement officials in practice stop interrogation if the individual asks for legal representation or to consult with the consulate." *Id.* In Brazil, "consular notification is considered one of the 'rights' under Article 5" of the Brazilian Constitution, which

July, Acton Crown Court, HHJ Sich (reported in *Legal Action* 23, December 1990); *R. v. Van Axel and Wezer* (1991) 31 May, Snaresbrook Crown Court, HHJ Sich (reported in *Legal Action* 12, September 1991).

Like their Australian counterparts, the British courts have recognized the unique significance of consular contact by ensuring that foreigners facing interrogation truly comprehend their legal rights and options. In its decision to exclude the custodial statements of two Lebanese defendants, the *Bassil and Mouffareg* court observed that a French or Arabic speaking consular official would have visited the defendants, assisted them in reaching an informed decision about their situation, and might well have advised them to obtain the assistance of counsel before making a statement.

Domestic courts holding that suppression is not an available remedy for an Article 36 violation because they found "no reason to think the drafters of the Vienna Convention had these uniquely American rights in mind" have missed an important point. *See, e.g., Lombera-Camorlinga, supra*, 206 F.3d at 886; *United States v. Page* 232 F.3d 536, 541 (6th Cir. 2000); *State v. Issa* (2001), 93 Ohio St. 3d 49, 56, fn. 2. There is nothing uniquely American about enforcing the rights to consular notification and access: as the practices of other VCCR parties indicate, access to timely consular notification is widely regarded as

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requires that an arrested person will be informed "of the right to remain silent and the right to have legal and familiar assistance." *Id.* at 381, n.2. Moreover, countries as diverse as Poland, Ireland, Indonesia have all enshrined the detainee's right to prompt consular information and notification in their national codes of criminal procedure. *See* Code of Criminal Procedure (Act of 6 June 1997), art. 612(2) (Poland); Criminal Justice Act, 1984 (Treatment Of Persons In Custody In Garda Síochána Stations) Regulations 1987, Reg. 14 (Ireland); Law of Criminal Procedure (KUHAP), art. 57 (2) (Indonesia).

an essential legal right. Indeed, nations that share our common law heritage have responded to violations of individual consular rights by applying judicial measures such as suppression. This Court has long recognized the relevance of that shared legal heritage in determining the necessary scope of individual rights and remedies. [22] "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Roper v. Simmons*, 125 S.Ct. 1183, 1200 (2005).

V. In Determining Whether Suppression is Appropriate, Courts Should Apply A Suitable Prejudice Standard

Although the court below did not directly address the question of remedies, it did cite with approval a sister court's decision holding that prejudice can never be demonstrated for an Article 36 violation where a foreign defendant has properly waived *Miranda* rights.[23] This presumption dangerously blurs the somewhat complementary yet fundamentally distinct nature of the two sets of rights at issue.

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[22] *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 488 n.59, 521-22 (1966) (comparing U.S. practice with that in India, Sri Lanka, and Scotland); *Rochin v. California*, 342 U.S. 165, 169 (1952) (Due Process Clause obliges courts to ascertain whether laws offend "those canons of decency and fairness which express the notions of justice of English-speaking peoples"); *see also Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (finding that "the practices of other nations, particularly other democracies" could be "relevant to determining whether a practice [is] so implicit in the concept of ordered liberty that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well").

[23] *See State v. Martinez-Rodriguez*, 33 P.3d 267, 276 (N.M. 2001), *cert. denied*, 535 U.S. 937, 122 S.Ct. 1317, 152 L.Ed.2d 225 (2002).

The most appropriate standard of review in these circumstances is that cited by the State of Oregon in its pleadings before this Court;[24] namely, the three-prong prejudice test that has been cited with approval by state and federal courts around the country.[25] Under this analysis, the defendant has the burden of establishing prejudice by producing evidence that: (1) he did not know of his consular rights; (2) he would have availed himself of those rights if he had been so advised; and (3) there was a likelihood that the contact [with the consulate] would have resulted in assistance to him.[26] This test was recently cited and applied by the Oklahoma Court of Criminal Appeals in *Torres v. State*, 120 P.3d 1184, 1187 (Okla. Crim. App. 2005):

> It is often impossible to say whether a particular action in a criminal trial could affect the outcome. However, it is possible to show what particular assistance, if any, a government would offer its citizen defending against a crime in a foreign country. That is the right and privilege safeguarded by the Convention. This Court is unwilling to raise the bar beyond that which the Convention guarantees. If a defendant shows that he did not know he could have contacted his consulate, would have done so, and the consulate would have taken

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[24] *Sanchez-Llamas v. Oregon*, Respondent's Brief in Opposition, filed August 15, 2005, available at 2005 WL 2974438.

[25] *See, e.g., U.S. v. Esparza-Ponce*, 7 F.Supp.2d 1084, 1097 (S.D. Cal. 1998); *U.S. v. Raven*, 103 F.Supp.2d 38 (D.Mass. 2000); *U.S. v. Tapia-Mendoza*, 41 F. Supp. 2d 1250, 1254 (D. Utah 1999); *U.S. v. Briscoe*, 69 F.Supp.2d 738, 747 (D. Virgin Islands 1999); *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo. App. 2002); *Zavala v. State*, 739 N.E.2d 135, 142 (Ind. App. 2000).

[26] *United States v. Villa-Fabela*, 882 F.2d 434, 440 (9th Cir.1989), *overruled on other grounds by United States v. Proa-Tovar*, 975 F.2d 592, 594-95 (9th Cir.1992) (en banc).

> specific actions to assist in his criminal case, he will have shown he was prejudiced by the violation of his Vienna Convention rights.

The Oklahoma court further noted that this prejudice test was consistent with the requirements of *Avena*:

> The phrase "actual prejudice" [in *Avena*] can refer only to prejudice flowing from the violation of the purpose of the Convention provision. That purpose is to ensure that a foreign citizen has the opportunity for aid from his or her government in an unfamiliar criminal jurisdiction. Whether or not the aid results in a different case outcome, a citizen must be actually prejudiced when he is denied aid his government would have provided.

Id. at 1188.

It would certainly be inappropriate to subsume the distinct right of consular notification into the question of whether a defendant has waived his rights under *Miranda*. Rights granted to an individual are distinct and waiver of one does not encompass a waiver of another. This is true even when the rights are closely related as are the Fifth Amendment rights to counsel and silence encompassed in the *Miranda* warnings itself. *See e.g. Connecticut v. Barrett*, 479 U.S. 523, 529-30 (1987) (defendant contemporaneously waived his right to silence and invoked right to counsel); *see also Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (specific invocation of right to counsel does not preclude subsequent voluntary waiver of right to remain silent); *and see Minnick v. Mississippi*, 423 U.S. 96, (1975) (invocation of right to remain silent does not invoke the right to counsel at all subsequent efforts at interrogation). Just as the waiver of one Fifth Amendment right under *Miranda* does not waive a distinct but related right, the waiver of a defendant's *Miranda* rights does not imply a waiver of his

rights to consular notification and access under an unrelated treaty.

CONCLUSION

Both domestic and international law require that an adequate remedy be provided to protect established rights. Suppression should be one of the remedies available to the lower courts in their assessment of Article 36 violations, and the judgment of the Oregon Supreme Court should be reversed.

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IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,
Petitioner,

v.

STATE OF OREGON,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, Director,
Virginia Department of Corrections,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

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INTEREST OF THE *AMICI CURIAE* *

Amici are professors and scholars of law with expertise in international law, federal jurisdiction, and the foreign relations law of the United States. This case raises important questions concerning the interpretation of treaties to which the United States is a party and the authority of an international tribunal to effect direct changes in a core area of U.S. domestic law, namely whether individuals can assert treaty violations in the course of a criminal prosecution and secure suppression of evidence and dismissal of such proceedings. Acceptance of the arguments put forward by petitioners would undermine the authority of the Executive Branch in interpreting the international obligations of the United States, disregard the authority of Congress to determine the conditions under which federal courts can enforce international law, and bring about an unprecedented and profound change in the relationship between international organizations and domestic lawmaking in the United States.

SUMMARY OF ARGUMENT

The Vienna Convention on Consular Relations does not require the United States to permit individuals to challenge treaty violations in domestic court, and there is no evidence that the President or the Senate intended such an outcome when they adhered to this treaty. The President's interpretation of the Vienna Convention warrants substantial deference from this Court. The President is in the best position to determine the impact of any particular inter-

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* In accordance with Supreme Court Rule 37.6, *Amici* affirm that no person or entity other than *Amici* and their counsel authored this brief in whole or in part, and that no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this *amicus curiae* brief are on file with the Clerk of the Court.

pretation on the foreign relations of the United States. In this case the President's interpretation is consistent with the text of the Convention, which does not specify the means of domestic enforcement, and the practice of other signatory states, not one of which has treated the Vienna Convention as authorizing private enforcement in domestic courts. A contrary interpretation would cast a pall on future treaty negotiations by the United States because it would increase the risk of unanticipated and potentially undesirable private interference with treaty enforcement.

Neither comity nor a policy of uniform treaty interpretation compels this Court to regard the Vienna Convention as creating a private right of enforcement. The International Court of Justice, the only tribunal that has reached such a conclusion, is not a national court but an international agency with clearly delimited authority. It lacks the characteristics of a domestic agency that invite judicial deference. Regarding it as an expert body deserving of special deference will deter the United States from joining future treaties that assign even limited responsibility to international agencies. Finally, a decision that the Vienna Convention authorizes private enforcement will disrupt rather than promote uniform treaty interpretation, as no other state has reached such a conclusion.

ARGUMENT

I. THE VIENNA CONVENTION DOES NOT CONFER ON INDIVIDUALS A JUDICIALLY ENFORCEABLE RIGHT TO CONSULAR NOTIFICATION AND ACCESS

This Court has long held that the decision of the United States to adhere to a treaty, made in conformity with Article II, § 2, cl. 2, does not automatically endow individuals with the right to seek judicial redress for treaty violations. Because treaties typically establish obligations between states, they do

not normally empower domestic courts to embark on their own enforcement regime. Courts are reluctant to infer that this power exists absent clear evidence that the Executive and the Senate intended such a result. In the case of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (Vienna Convention), there is no evidence indicating that the Executive and the Senate expected courts in the United States to adjudicate private claims based on that treaty.

A. The Question of Whether a Treaty Creates a Judicially Enforceable Right Is Analytically Distinct From the Issue of Whether a Treaty is Self-Executing

This Court long has recognized that the questions of whether a treaty is self-executing and whether it allows individuals to seek judicial redress for its violation are analytically distinct questions. To say that a treaty is self-executing means only that no further legislative enactment is necessary for the treaty to have legal effect in the United States. In the case of the Vienna Convention, for example, the treaty is self-executing in the sense that police officials became obligated to inform persons under detention of the possibility of consular notification without further actions by Congress. To say that a treaty has *some* legal effect, however, does not mean that every person with an interest in the treaty's enforcement necessarily has the power to seek judicial relief for a violation. Rather, the courts of the United States must determine who has the authority to enforce a treaty and what remedies may be sought in light of what the treaty text expressly requires and what the Executive and the Senate intended in adhering to the instrument, interpreted against the general background practice of the political branches and the judiciary with regard to treaty enforcement.

At a minimum, a treaty should not be read as empowering private persons to obtain domestic judicial enforcement in circumstances where a domestic statutory enactment would not be interpreted as authorizing a private suit. As this Court has held on numerous occasions, a statute can have legal effect and still not delegate enforcement power to individuals. *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. ___ (2005); *Gonzaga University v. Doe*, 536 U.S. 273 (2002); *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Thompson v. Thompson*, 484 U.S. 174 (1988); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *cf. Cannon v. University of Chicago*, 441 U.S. 671, 730 (1979) (Powell, J., dissenting).

Some of these cases involve the doctrine of implied private rights of actions, while others deal with the scope of specific legislation, particularly 42 U.S.C. § 1983. What they have in common, and what makes them relevant to the issue of treaty interpretation, is their recognition that legislative choices about enforcement mechanisms represent significant policy determinations that should not be preempted by the judiciary. The manifest capacity of Congress to provide expressly for private enforcement of its enactments often has persuaded this Court that it should not attempt to create an additional enforcement mechanism when Congress has not asked it to do so. The same logic applies to treaty interpretation.

Petitioners, in effect, seek a rule that would create a strong presumption in favor of implying judicial enforcement of treaties on behalf of private persons. The Brief for *Amici*

Curiae Law Professors in Support of Petitioners, at 5, argues in particular that:

> "[I]f an individual was harmed by a past violation of his primary treaty rights, or if he is likely to be harmed by a future violation of those rights, then the individual is entitled to a judicial remedy, even if the treaty itself does not create a private right of action, and even if the treaty says nothing about the capacity of individuals to invoke the treaty before a domestic court."

This proposal should be compared with the four-factor test of *Cort v. Ash*, 422 U.S. 66 (1975), which for some years was invoked by this Court as the basis for implying a private right of action from a statute. The proposal would go much further than did the now discredited *Cort* test, because it would mandate private enforcement even if only one of the *Cort* criteria were met, namely if the plaintiff is a member of a class for whose especial benefit a measure was adopted.

Yet the reasons for not implying a private right of enforcement from the unadorned language of a treaty provision are, if anything, stronger than those for not reading private enforcement rights into a statute. First, treaty rights by their nature involve the obligations of not just the United States, but of the other parties to the compact. Yet private judicial enforcement of treaty rights in other countries, absent clear and explicit provision, is unheard of. Thus, private enforcement in the United States would create a substantial asymmetry in the burdens borne by the United States. Second, treaty obligations, unlike statutes, cannot be amended unilaterally by the President and Congress. Rather, clarification of a treaty in light of a judicial determination that does not reflect the intent of the parties requires a new treaty negotiation and unanimous assent of all treaty parties. These institutional impediments to treaty adoption and implementation suggest that this Court should not lightly read private enforcement into treaties.

On numerous occasions Congress has provided expressly for private enforcement of treaty rights. The most common instance involves dispute settlement processes that have the capacity to produce monetary awards. The United States both has signed treaties with individual states to resolve particular disputes and joined multilateral regimes that create a means for addressing prospective controversies. In these instances, Congress has enacted separate legislation providing for the domestic recognition of the decisions of these tribunals. Where no separate authorizing legislation applied, this Court refused to give effect to a tribunal award. *See, e.g., La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899) (claim derived from Convention Between Mexico and the United States of 1868 subject to judicial consideration only pursuant to 1892 statute); *United States* v. *Blaine*, 139 U.S. 306, 323 (1891) (same Convention: "The government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it."); *United States v. Weld*, 127 U.S. 51 (1888) (1871 Treaty of Washington); *Alling v. United States*, 114 U.S. 562 (1885) (1868 Mexico-United States Convention); *Great Western Insurance Co. v. United States*, 112 U.S. 193 (1884) (1871 Treaty of Washington); *Frelinghuysen* v. *Key*, 110 U. S. 63, 74 (1884) (1868 Mexico-United States Convention: "No nation treats with a citizen of another nation except through his government.").

Two modern multilateral regimes to which the United States is a party similarly reflect this pattern. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, provides for the recognition and enforcement of commercial arbitration awards. The United States both joined the treaty and enacted 9 U.S.C. §§ 201-07, which gives domestic force to the treaty rights by expressly authorizing judicial enforcement. Similarly, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270,

T.I.A.S. No. 6090, 575 U.N.T.S. 159, obligates the United States to give effect to arbitration awards in investment disputes. Congress then enacted a statutory provision enabling courts to enforce these awards. 22 U.S.C. §§ 1650, 1650a (2001). Significantly, Congress provided for the special case of enforcement of an international arbitral award against the United States with yet another statute, 28 U.S.C. § 2414 (2001), that gives the Attorney General the discretion to approve payment except in cases where, under authority provided by 22 U.S.C. § 1650a(b), a federal district court has ordered enforcement.

Whatever the practice of this Court in the period before *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), when federal courts freely drew on a wide range of sources to craft rules of decision in federal cases, its modern practice has been not to infer an intention to authorize private enforcement of a treaty in the absence of either a separate statute or otherwise clear treaty language and manifest intent of the President and the Senate to do so. See, *e.g.*, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989) (treaties not intended to create judicially enforceable private rights). It is this practice that provided the contemporary background to the decision of the President and the Senate to adhere to the Vienna Convention in 1969.

Express authorization of judicial enforcement of treaties is the norm; the instances since *Erie* where this Court has found that a treaty independently provides for private enforcement are rare. For example, the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in note following* 49 U.S.C. § 40105 (2001), commonly known as the Warsaw Convention, addresses directly the rights of carriers, shippers and passengers engaged in international air transport, using mandatory language that is typical of private law statutes. Not surprisingly, the signatories to this Convention have treated it as supple-

menting the rules of law that courts can apply to private disputes. *E.g.*, *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (deriving rule of decision from Warsaw Convention in private litigation); *Eastern Airlines v. Floyd*, 499 U.S. 530 (1999) (same). But nowhere has any signatory country's domestic court, much less this Court, inferred from the Warsaw Convention a power of a private person to seek judicial redress against a state that does not fully implement its obligations under the Convention.[1]

B. The Executive Branch's Interpretation of the Vienna Convention is Entitled to Great Deference

The Executive branch consistently has interpreted the Vienna Convention as not conferring judicially enforceable rights on criminal defendants. The State Department articulated this interpretation to the Senate in 1969, when the Convention was being considered for ratification, and in a letter to all 50 state governors immediately following ratification. See S. Exec. Rpt. No. 9, at 18 (1969) (quoting the State Department's representation that "[t]he Vienna Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing

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[1] *Amici* cite *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), as an instance where this Court implied a private right to judicial enforcement from executive agreements regarding the claims of Holocaust victims. Brief for Amici Curiae Law Professors in Support of Petitioners at 19-20. But, as this Court noted, the executive agreements at issue in *Garamendi* were not treaties, but rather an expression of the "foreign policy of the Executive Branch" with which a California statute interfered. 539 U.S. at 413. The significance of the policy of the Executive as a basis for preempting state law that interferes with its conduct of foreign relations rests on constitutional grounds that are independent of treaty interpretation. See, *e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Zschernig v. Miller*, 389 U.S. 429 (1968); *United States v. Pink*, 315 U.S. 203 (1942).

consular conventions."); *United States v. Li*, 206 F.3d 56, 64 (1st Cir. 2000) (quoting the State Department legal advisor's 1970 letter denying that "the Vienna Convention will require significant departures from the existing practice within the several states of the United States"). More recently, the State Department has emphasized that "such a statement would not have been made if the Department of State had contemplated that the [Vienna Convention] might require that failures of consular notification be remedied in the criminal process through prejudice hearings, and possibly the suppression of evidence or the undoing of other aspects of the criminal process." Department of State Answers to the Questions Posed by the First Circuit in *United States v. Nai Fook Li* (Oct. 15, 1999) (available at http://www.state.gov/documents/organization/7111.doc).

The Executive's representations to the Senate, the States, and the courts are mirrored in its actual practice implementing the Vienna Convention. As the Solicitor General explained just last year:

> The State Department's longstanding practice has been to investigate a country's complaint about the absence of notification. When a violation has been confirmed, the State Department has extended a formal apology to that country's government and sought to prevent a recurrence through educational efforts.

Brief for the United States as *Amicus Curiae* in No. 04-5928, *Medellin v. Dretke*, at 22-23.

The State Department has taken an identical position on behalf of the United States when appearing before international tribunals. The first was Paraguay's suit in the International Court of Justice (ICJ) over Vienna Convention violations in the case of Angel Breard. Paraguay alleged that the Convention entailed an enforceable right to over-

turn Breard's conviction. The State Department, however, insisted that:

> "There is absolutely no support for this claim in the language of the [Vienna] Convention. The Court should not read into a clear and nearly universal multilateral instrument such a substantial and potentially disruptive additional obligation that has no support in the language agreed by the parties."

Verbatim Record (Paraguay v. U.S.), 1998 I.C.J. 426, at 3.20. Likewise, before the Inter-American Court of Human Rights, the Department argued that the Vienna Convention "does not require the domestic courts of State parties to take any actions in criminal proceedings, either to give effect to its provisions or to remedy their alleged violation." Written Observations of the United States of America, Request for Advisory Opinion OC-16, June 1, 1998 (corrected June 10, 1998).

Most recently, in its brief to this Court in *Medellin v. Dretke*, the United States reiterated that "[t]he Executive Branch has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right to challenge his conviction and sentence." Brief for the United States as *Amicus Curiae* in No. 04-5928, *Medellin v. Dretke*, at 22-23; see also Brief for the United States as *Amicus Curiae* in Nos. 97-1390 and 97-8214, *Republic of Paraguay v. Gilmore & Breard v. Greene*, at 18-23 (taking the same position). The Executive's interpretation is thus emphatic, consistent, and longstanding. It has been advanced in legislative, judicial, and international fora, as well as in the State Department's day-to-day practice. And it is consistent with the Department's interpretation of other treaties that employ similar language to the Vienna Convention. See Brief for the United States as *Amicus Curiae* in No. 04-5928, *Medellin v. Dretke*, at 25-26 (discussing the International Convention for the Suppression of the Financing of Terrorism).

"Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). Judges Selya and Boudin have explained that this deference arises not only "because the State Department negotiates and administers such treaties," but also "because, when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice. That voice is the voice of the State Department, which in such matters speaks for and on behalf of the President." *Li*, 206 F.3d at 67 (Selya & Boudin, JJ, concurring). Should this Court reject a position taken so emphatically and consistently by the United States in international fora, it would risk undermining the credibility of the Government in future litigation and negotiations. That risk should counsel deference to the Executive's consistent interpretation.

C. The Practice of Other States Confirms That No Judicially Enforceable Right Inheres in the Vienna Convention

There are only a handful of reported foreign judicial decisions about enforcement of the Vienna Convention. What precedent exists, however, indicates that criminally accused in other countries do not have the right to obtain independent judicial enforcement of the Vienna Convention.

The leading case is *Regina v. Partak*, 160 C.C.C. (3d) 553 (Ontario Sup. Ct. Jus. 2001), which involved a U.S. citizen whom Canadian police did not inform of his right to consular access when arresting him for murder. The Canadian court ruled that, although the police conduct had violated the accused's rights under Article 36 of the Convention, this violation did not give rise to any independent basis for judicial relief. Instead, the court applied the same standards applicable to a Canadian subject to determine whether the

accused had received proper notice of his right to counsel and had made a voluntary confession.

Similarly, a German court also assumed that Article 36 operated for the benefit of individuals but did not regard that provision as having any impact on the judicially enforceable rights of a criminal accused. *Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 7, 2001*, 5 BGHSt 116/0, *published in* NStZ 2002, 168 (F.R.G.). Moreover, German practice generally reflects the prevailing view of the means of enforcement of the Vienna Convention, namely that a state rectifies its violation of Article 36 by providing to its treaty partner an apology and assurance on future precautions. *See LaGrand (Germany v. United States)*, 2001 I.C.J. 104, at ¶ 63 (describing German practice).

Neither counsel for petitioners nor the many *amici* who have filed briefs in their support have discovered a single case where a foreign court has understood the Vienna Convention as obligating it to entertain private claims based on its violation.[2] Our research also has failed to uncover any such case. While the practice of other nations in the application of a multilateral treaty are not binding on this Court, they do provide substantial evidence of what the makers of that treaty intended. Here the practice of signatory states is fully consistent with the position that the Vienna Convention does not

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[2] The Brief of Former United States Diplomats as *Amici Curiae* in Support of Petitioners, at 20, cites the Canadian and German decisions discussed above as authority for the proposition that Canadian and German courts "have accepted as binding the ICJ's interpretation that the VCCR creates judicially enforceable rights." This is wrong. First, the Canadian decision contains no reference to any ICJ decision at all, and the German decision made no reference to the ICJ's views on judicial enforcement. Second, in each instance the court ruled that the Vienna Convention did not authorize national courts to provide any special remedies where the police failed to honor the notification obligation.

of its own force authorize national courts to entertain private efforts to enforce its obligations.

D. The Court Should Avoid an Interpretation of the Vienna Convention That Will Discourage the United States from Entering into New Treaty Commitments

The recognition by this Court of a private right to seek judicial enforcement of the Vienna Convention would do more than impose on the United States a burden that no other national court has placed on any state that adheres to that treaty. It would establish a precedent for implication of private enforcement of international treaties more broadly. Such a precedent would cast a pall on all future U.S. treaty negotiations, at least where the interests of individuals were potentially at issue.

Since the conclusion of World War II, the Executive and Congress have manifested a persistent concern that the assumption of international obligations by the United States would lead to new assertions of claims for judicial relief by private persons, with attendant uncertainty and potentially undesirable outcomes. During the 1950s the Senate came within a single vote of recommending a constitutional amendment that would have precluded any treaty from having any domestic legal effect. President Eisenhower at that time initiated a practice of reassuring the Congress that the Executive would not seek to use international agreements as a general means for changing domestic law. *See* Curtis A. Bradley, *Foreign Affairs and Domestic Reform*, 87 VA. L. REV. 1475 (2001). Later administrations have adhered to this path.

On some occasions, the President and the Senate have taken extra measures to ensure that the judiciary does not interpret a treaty as creating new rights for which individuals can seek judicial enforcement. The practice of announcing

"reservations, understandings and declarations" (RUDs) at the time of signing or approving a treaty has become common since the Carter Administration. Typically a RUD contains a statement to the effect that the United States does not regard the treaty as operating independently of the existing mechanisms for protecting individual interests under U.S. law. For a comprehensive review of the practice, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000).

It would be wrong, however, to assume that the President and the Senate intend a treaty to create judicially enforceable private rights in all instances where a RUD is not made. First, the practice is precautionary and does not permit any negative inference. Second, some authorities have questioned whether it is even possible for a RUD to be effective. Not only have scholars argued that the Constitution forbids the President and the Senate from imposing any limitation on the domestic effect of an international treaty, *e.g.*, Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995), but at least some judges have embraced the argument. *E.g.*, *Igartua-De La Rosa v. United States*, 415 F.3rd 145, 189-90 (1st Cir. 2005) (Howard, J., dissenting).

Sound regard for the President's responsibility to conduct the international affairs of the United States requires a strong presumption that, in the absence of very clear treaty language and confirmatory evidence of party intent from the Executive and the Senate, treaty obligations do not create private entitlements to judicial relief. Any other rule is likely to reduce both the number and quality of international commitments that will be undertaken by the United States.

Nothing other than the national interest and a desire to ameliorate international problems compels the Executive to enter into treaty negotiations. The Senate historically has exercised its advise and consent power with great circum-

spection and often has refused to approve treaties that present a risk of unforeseeable domestic legal developments. The predictable outcome of a presumption in favor of private enforcement thus would be fewer and lesser treaties, undermining U.S. objectives in international cooperation.

These risks are illustrated by recent litigation over the Vienna Convention. Until 2005, the United States was a party to the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 (Optional Protocol), a treaty that gave the ICJ the authority to hear disputes between parties to the Convention. Concerned that some U.S. courts might treat the decisions of the ICJ as a binding rule of decision that private persons could invoke in their lawsuits, the President decided to withdraw from the Optional Protocol.[3]

The building of international law through treaties and other international agreements is both critical and valuable. The President and the Senate must engage a fast changing, and not always benign, world with a full array of legal resources. This exercise of the foreign affairs power and the treaty power itself will be thwarted by appending an unpredictable set of civil lawsuits and criminal defenses to silent treaty texts. Criminal law enforcement in our constitutional system is handled by hundreds of thousands of federal, state, county, and local police officers. The potential disruption to thousands of criminal prosecutions, including grave crimes that involve victim's rights, is not to be lightly entertained.

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[3] Nor was this an idle fear. Months after the denunciation of the treaty, one Court of Appeals asserted that "we are of the opinion that the United States is bound by ICJ rulings in cases where it consented to the court's jurisdiction, just as it would be bound by any arbitral procedure to which it consented . . ." *Jogi v. Voges*, 425 F.3rd 367, 384 (7th Cir. 2005).

In recognition of these exigencies, this Court should clarify the law applicable to the domestic enforcement of treaties to make clear to the political branches what the international obligations that they contemplate will mean in terms of domestic consequences. In particular, this Court should support the constitutional role of these branches as the masters of our nation's international commitments.

II. NEITHER COMITY NOR THE NEED FOR UNIFORMITY IN TREATY INTERPRETATION JUSTIFIES A CONCLUSION THAT THE VIENNA CONVENTION FORBIDS A STATE FROM APPLYING A NEUTRAL PROCEDURAL RULE TO FORECLOSE UNTIMELY ASSERTIONS OF A CLAIM OTHERWISE ASSERTABLE UNDER THAT TREATY

Petitioners argue that this Court should follow the ICJ's interpretation of the Vienna Convention. Without warrant in the language of the Convention, the ICJ has asserted that Article 36 operates for the benefits of individuals, that the Convention entitles persons who have not received the requisite notification of a right to consular access to a judicial hearing as to whether the treaty violation has prejudiced them, and that this entitlement cannot be made contingent on timely assertion of the violation. All three of these interpretations are wrong. Moreover, no reason exists for this Court to privilege the interpretation of the ICJ over the interpretation consistently offered by the Executive.

A. The Doctrine of Comity Traditionally Has Been Applied to the Decisions of Foreign States, Not Those of an International Organization Created by Treaty

Petitioners argue that this Court must follow the ICJ's interpretation of the Vienna Convention as a matter of com-

ity. But this argument is inapplicable under the circumstances of this case.

First, the ICJ's interpretation cannot be reconciled with the language of the treaty or general international practice. Until the ICJ's decisions in the several Vienna Convention cases, no responsible decisionmaker had suggested that treaty commitments otherwise silent on the issue would override neutral and longstanding domestic rules regarding the timeliness of asserting claims and procedural default.

Second, the doctrine of comity, which has its origins in the Treaty of Westphalia and the concepts of sovereign power arising from the settlement of the Thirty Years War, applies to sovereigns, not to international bodies that themselves are the product of international agreements. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), clearly states that comity constitutes "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another *nation*." (emphasis added). This limitation on the doctrine of comity is not a mere formality: International law rests on the choices and behavior of states. An international organization such as the ICJ is a creature of the international instrument that creates it, and has only such authority as that instrument specifies, and hence the signatory states authorize. Extending the authority of an international body through common law doctrines such as comity undermines, rather than reinforces, the choices that signatory states made in the body's foundational instrument.

International law traditionally has involved rules created by states that constrain the otherwise unfettered exercise of national sovereignty. But an international organization such as the ICJ has no independent sovereignty, and thus nothing to surrender through international bargaining. Rather, an international body's authority is the product of bargaining among the states that create it. Comity, which grows out of both respect for another nation's sovereignty and an expec-

tation of reciprocity, thus has no bearing on an international entity such as the ICJ, which lacks both sovereignty and the capacity to act reciprocally.

Nor is the ICJ, in its role as an adjudicative body interpreting the Vienna Convention in the course of resolving inter-state disputes properly before it, analogous to a domestic agency charged with interpretation of a statute. We do not question the need for judicial deference to a domestic agency's exercise of the discretion left to it by Congress to elucidate the meaning of the statute that it administers. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). But an international court does not stand in the same position as does a domestic agency in its effect on the domestic law of the United States. There is no sound basis for inferring from any supposed ambiguity in treaty language a delegation to an international agency of the authority to provide an authoritative, binding interpretation of its meaning.

First and most important, the formulation of a statutory interpretation by a domestic agency is subject to numerous procedural and institutional constraints during its promulgation and can always be changed by a simple legislative enactment. An international organization, in contrast, does not have to comply with any requirements of public access and participation, nor indeed with the ethical rules appropriate to a constitutional democracy. More importantly, the United States cannot unilaterally correct or amend ICJ interpretations with which it disagrees. It only has the unpalatable alternative of withdrawing from a treaty, as it did with regard to the Optional Protocol. Congress, by contrast, can repudiate or revise any agency interpretation of domestic law with which it disagrees while leaving the underlying statutory scheme intact and certainly without incurring the international repercussions of a treaty abrogation.

Second, the mandate and composition of an international tribunal reflects the many and various national interests of the states that set it up. Although we must assume that establishment of a tribunal by a treaty to which the United States is a party reflects the best interests of the United States, it does not follow that the members of the tribunal have any ongoing obligation or incentive to act in ways that are compatible with U.S. goals and values. Rather, members are chosen by particular states and, even though they are not the official representatives of their national governments, often continue to reflect the perspective of those governments.[4]

Nothing in this Court's past decisions indicates a willingness to give special deference to the ICJ's interpretation of international law. On occasion this Court has regarded ICJ decisions as evidence of the content of international law in cases that depend on international law for their resolution. See, *e.g.*, *United States v. Maine*, 475 U.S. 89 (1986) (looking to 1951 ICJ decision as evidence of rule of decision to be applied in dispute over seabed ownership); *United States v. Louisiana*, 470 U.S. 93 (1985) (same). But it also has demonstrated a willingness to disregard or narrow claims based on ICJ judgments. See, *e.g.*, *Breard v. Green*, 523 U.S. 371, 375 (1998) (ICJ decision did not trump procedural rules of forum state).

The same approach should apply here. The opinion of the ICJ is one piece of evidence as to the content of the obligations that signatories to the Vienna Convention bear. This evidence cannot outweigh, however, the language of the Convention, the considered views of the Executive, the consistent practice of the signatory states, or clear indications

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[4] For recent scholarship presenting evidence that the judges on the ICJ vote in ways that broadly reflect the interests of the states that appoint them, see Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?* 34 J. LEG. STUD. 599 (2005).

of the understanding of the President and the Senate at the time that the United States approved the treaty.[5] All of these factors make clear that when the United States approved the Vienna Convention, it did not thereby endow persons accused of crimes in the United States with a new avenue to obtain judicial review of police actions.

B. Extending the Doctrine of Comity to an Organization Created by Treaty Would Discourage the United States from Agreeing to Establish Such Organizations

The creation of permanent international organizations based on treaties and other international agreements is one of the most important developments of the post-World War II period. The United Nations, the World Bank and the International Monetary Fund were established at the end of the War; many other bodies have followed since. Important recent examples include the World Trade Organization, established by an international agreement that Congress endorsed in 1994, and the International Criminal Court, founded by a treaty that the United States signed in 2001 but, following strong indications of opposition in the Senate, President Bush later indicated that the United States would

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[5] To the extent the legislative history of the Optional Protocol is relevant, one should note that a representative of the State Department explained in testimony before the Senate, regarding the legal effect of the Optional Protocol, "[i]f problems should arise regarding the interpretation or application of the convention, such problems would probably be resolved through diplomatic channels." Vienna Convention on Consular Relations, Sen. Exec. Rpt. 91-9, at 19 (1969) (Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration). Additionally, "*parties* to the optional protocol may agree to resort to . . . an arbitral tribunal" or conciliation. *Id* (emphasis added). Nothing in this testimony suggests that the United States anticipated that accession to the Optional Protocol would require U.S. courts to open up literally thousands of future criminal convictions to judicial challenge due to the ICJ's interpretation of the Vienna Convention.

not approve. Many of these organizations typically exercise an adjudicative function and purport to provide authoritative interpretations of the treaties or agreements on which they are based.

We do not question the value and importance of these kinds of international organizations, whatever the shortcomings of particular bodies. They permit states to develop organized, predictable and multilateral responses to global problems that overflow national boundaries. Their assertions about the meaning of particular treaties can guide the conduct of international actors and help to form a consensus. But if a consequence of setting up such an organization were a substantial possibility that U.S. courts would regard its pronouncements as authoritative or preclusive, then our political branches understandably would be wary of entering into new commitments, or of continuing adherence to prior agreements, that establish such adjudicative bodies.

In a few recent instances where the United States by legislative enactment consented to the delegation of certain adjudicatory functions to international organizations, Congress expressly provided that private persons could not invoke any aspect of the international agreement (including implicitly the interpretations of the presumably authoritative interpreters) in domestic court. *E.g.*, North American Free Trade Agreement Implementation Act of 1993, § 102(c) (codified at 19 U.S.C. § 3312(c)); Uruguay Round Agreements Act of 1994, § 102(c) (codified at 19 U.S.C. § 3512(c)); Dominican Republic-Central America-United States Free Trade Agreement Implementation Act of 2005, § 102(c) (codified at 19 U.S.C. § 4012(c)). These particular instances indicate a more general unwillingness on the part of

Congress to invite domestic courts to exercise free reign in implementing the decisions of international tribunals.[6]

A decision by this Court to extend the doctrine of comity to the ICJ not only would run counter to these clear indications of the intent of the political branches, but would chill future efforts to create and empower international tribunals. The President and Congress, in the case of executive agreements, or the Senate, in the case of treaties, would not be able to ensure that establishment of such a body would not have unwanted ramifications in domestic law. As noted above, they have been unable to rely on the compliance of lower courts even in the face of express directions not to treat a treaty as creating judicially enforceable rights. Without a clear indication from this Court about the limited effect of international adjudication on domestic law, the political branches are likely to hold off from any future commitments in spite of their clear value.

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[6] In each of these three instances, Congress has provided for a narrowly tailored legal mechanism for domestic enforcement of the trade agreement. The United States is authorized to bring suit for prospective relief against state and local law or practice that violates U.S. obligations under the agreement. No other kind of litigation is permitted. North American Free Trade Agreement Implementation Act of 1993, § 102(b)(2) (codified at 19 U.S.C. § 3312(b)(2)); Uruguay Round Agreements Act of 1994, § 102(b)(2) (codified at 19 U.S.C. § 3512(b)(2)); Dominican Republic-Central America-United States Free Trade Agreement Implementation Act of 2005, § 102(b)(2) (codified at 19 U.S.C. § 4012(b)(2)).

C. Other Countries Do Not Ordinarily Interpret Their Treaty Commitments as Delegating to International Organizations the Authority to Render Judgments in Particular Disputes To Be Enforced by Their Domestic Courts in the Absence of an Express Provision Stipulating Such an Effect

Petitioners argue that this Court should defer to the ICJ's interpretation of the Vienna Convention so as to promote uniform interpretation of that treaty. To the contrary, were this Court to regard the jurisprudence of the ICJ as obligating the judiciary of the United States to enforce the Vienna Convention at the behest of private persons, it would depart from, rather than reinforce, widely accepted international understandings about the relationship between international obligations and domestic law.

Other countries do not normally interpret a treaty acceding to the jurisdiction of an international tribunal as imposing on domestic courts the responsibility for enforcing the orders of such tribunals. The only significant exception to this principle is the case of the judicial bodies of the European Community. But the European Community constitutes a *sui generis* attempt to create an extensive legal regime embracing its member states, not a template for general international law. And even the European Court of Justice, the principal judicial body of the European Community, has rejected the possibility that it could act as an enforcing agent for any other international tribunal.

Considering first the International Court of Justice, our research has turned up no instance where a nation has embraced the principle of direct enforcement of ICJ orders. The universal practice is to regard ICJ decisions as important evidence of the content of international law in cases where such law is relevant to a matter otherwise before a national court, but not as independent grounds for a national court's

authority. Nations understand that their legislatures and governments, not their judiciaries, have the primary responsibility for effecting compliance with ICJ orders. We are unaware of any instance, and petitioner and the various *amici* in support of petitioner cite to no instance, where another state through a domestic court decision has mandated the direct enforcement of an ICJ order. For a comprehensive review of foreign judicial decisions rejecting direct enforcement of ICJ decisions, see A. Mark Weisburd, *International Courts and American Courts*,21 MICH. J. INT'L L. 877, 886-87 (2000).[7]

European practice regarding the European Court of Human Rights also is instructive. This international tribunal oversees compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, a treaty with 45 parties that protects basic human rights in the covered countries. Since 1998, individuals have had the right to bring a case directly to the European Court of Human Rights. But enforcement of its judgments, including orders for compensation, depends entirely on local law, not the Convention itself. In the United Kingdom, for example, it is the Human Rights Act 1998, ch.

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[7] *Amici* intimate that Belgium has given direct effect to an ICJ decision involving the immunity from arrest of government officials. Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioners at 26 n.46. But the Belgium courts grounded their decisions on their interpretation of domestic law. See Constanze Schulte, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 270 (2004); Alain Winants, *The* Yerodia *Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 LEIDEN J. INT'L L. 491, 505-06 (2003); Jan Wouters, *The Judgement of the International Court of Justice in the* Arrest Warrant *Case: Some Critical Remarks*, 16 LEIDEN J. INT'L L. 253, 266 (2003) (Belgian Supreme Court decision rested on Belgian statute). *Amici* wishes to substitute speculation by scholars about the motivation of these decisions for what the courts actually said.

42 (Eng.), that provides the legal basis for domestic enforcement of the Convention. For a recent discussion of the relationship between the Convention and British law, see *A v. Secretary of State*, [2005] 2 A.C. 68, ¶ 42 (H.L. 2004). Even European nations whose constitutions subordinate domestic legislation to international law, such as Germany, Italy, and the Netherlands, do not give direct effect to the judgments of the European Court of Human Rights. For a thorough discussion of practice in these countries, see THE EXECUTION OF STRASBOURG AND GERMAN HUMAN RIGHTS DECISIONS IN THE NATIONAL LEGAL ORDER (Tom Barkhuysen et al. eds. 1999).

The European Union (EU) and the European Community (EC), the EU's principal institutional structure, rest on treaties which, in the case of the European Community, create judicial bodies. The parties to these treaties do regard the decisions of the judiciary of the European Community, namely the European Court of Justice (ECJ) and the ECJ's Court of First Instance, as generally creating judicially enforceable interests in their domestic legal order. See, *e.g.*, *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, [1991] 1 All E.R. 70 (H.L.). But cf. *Brunner v. The European Union Treaty*, [1994] 1 C.M.L.R. 57 (German Federal Constitutional Court) (reserving right to review decisions of ECJ for compliance with German constitutional order). This outcome, however, results not from an abstract sense of obligation to comply with the orders of international tribunals, but rather because of explicit provisions in the treaty constituting the EC. Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C 325) 33, Articles 228, 244, 256. These articles expressly impose on domestic courts the obligation to carry out the orders of the ECJ.

The direct enforcement of ECJ decisions by the member states does not represent a new approach generally to

domestic incorporation of international law. The EC involves a distinctive, perhaps unique, level of extensive and intensive cooperation among the members, who in a sense have formed a new confederation of member states. Direct enforcement of the ECJ's decisions facilitates that cooperation, much like the decisions of this Court promote the smooth workings of our federal union. Rather than serving as a new model of international adjudication, the ECJ operates in relation to the legal system of the member states much as this Court does with respect to the legal systems of the several States.

The ECJ's approach to international law (the foundational treaties of the EU and the EC aside) closely resembles the traditional perspective of this Court. Like this Court, the ECJ recognizes that the decisions of international tribunals are informative, but that treaty provisions obligating the EC to submit disputes to a tribunal do not mean that the decisions of those tribunals become part of EC law. In particular, the ECJ considers the decisions of the ICJ as evidence of the content of international law in cases where it must look to international law for a rule of decision but retains independent competence to determine whether the international rule at issue has become part of the body of EC law. See, *e.g.*, *A. Racke GmbH & Co. v. Hauptzollamt Mainz (Case C-162/96)*, 1998 E.C.R.I-3655; *Anklagemyndigheden v. Poulsen (Case C-286/90)*, 1992 E.C.R. I-6019. Cf. Rosalyn Higgins, *The ICJ, the ECJ, and the Integrity of International Law*, 52 INT'L & COMP. L.Q. 1 (2003) (explaining relationship between ECJ and ICJ).

As we discussed above, no signatory to the Vienna Convention has regarded that treaty as an exception to the general pattern of no private judicial enforcement of treaty obligations. This Court should uphold the Executive's consistent understanding of U.S. obligations under that treaty and refuse to imply a private right to judicial enforcement.

CONCLUSION

The Vienna Convention does not give private persons the power to challenge in court alleged violations of its provisions. A decision to the contrary would have a serious negative impact on the willingness of the political branches to enter into new treaties and create new international organizations with adjudicative functions. The course urged on this Court by petitioners, far from bringing U.S. practice into conformity with that of other nations, would give international law and the decisions of international tribunals a role in the U.S. legal system that other nations do not allow their courts to undertake. Accordingly, the judgments of the Supreme Court of Oregon and the Supreme Court of Virginia should be affirmed.

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Supreme Court, U.S.
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Petitioner,

v.

OREGON,
Respondent.

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF OREGON AND THE SUPREME COURT OF VIRGINIA

BRIEF FOR *AMICI CURIAE* REPUBLIC OF HONDURAS AND OTHER FOREIGN SOVEREIGNS IN SUPPORT OF PETITIONERS

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Amici curiae Republic of Honduras, Argentine Republic, Republic of Bolivia, Federative Republic of Brazil, Republic of Chile, Republic of Colombia, Republic of El Salvador, Republic of Guatemala, Republic of Peru, and Oriental Republic of Uruguay respectfully submit this brief in support of the petitioners in these cases.[1]

INTEREST OF *AMICI CURIAE*

Each *amicus*, like the United States, has adopted the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("Vienna Convention" or "Convention"). In addition, *amici* Argentina, Chile, Colombia, Peru, and Uruguay are signatories to the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 488 ("Optional Protocol"). The United States was, until earlier this year, also a signatory to the Optional Protocol.

Article 36(1)(b) of the Convention provides that a signatory state that detains a foreign national must, upon request of the detainee, promptly inform the foreign national's consulate of the detention, and also must promptly advise the detainee of "his rights" to consular notification under the Convention. Article 36(2) of the Convention provides that signatory states must ensure that their laws and regulations give "full effect" to the protections afforded by Article 36(1) of the Convention.

These protections are of critical importance to *amici*. Hundreds of thousands of *amici*'s citizens reside in the United States,[2] and many more visit every year. Article 36 ensures that those foreign nationals may receive the benefit

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Counsel for all parties consented in writing to the filing of this brief.

[2] *See, e.g.*, Table FBP-1, *Profile of Selected Demographic and Social Characteristics: 2000, available at* http://www.census.gov/population/cen2000/stp-159 (last visited Dec. 21, 2005).

of consular assistance when they are confronted with criminal proceedings in surroundings that may be unfamiliar to them. Unless a detained individual receives prompt notification that he may seek consular assistance, that benefit is often lost and his ability to mount an effective defense may well be hindered.

The Optional Protocol is also of great importance to the *amici* who are signatories to that agreement. The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol art. 1, 21 U.S.T. at 325. The Optional Protocol thus provides a means within the established framework of international law whereby parties to the Convention may resolve their differences over the interpretation and application of the Convention, with the understanding that, once the International Court of Justice ("ICJ") renders a decision, those parties will abide by that decision in the future. Moreover, the ICJ was given jurisdiction not only to decide whether any country had violated the Convention, but also to resolve any dispute over the *interpretation* of the Convention—indicating that parties that agreed to submit disputes to the ICJ (including, previously, the United States) would thenceforth be bound by that court's "interpretation" of the treaty.

The cases before the Court, both of which involve conceded violations of the Vienna Convention by state officials, raise the question of whether and how the United States will comply with the Vienna Convention, and in particular whether and how the United States will provide an effective remedy for *amici*'s citizens who have been prejudiced by violations of the Convention. More broadly, these cases underscore the importance of treaty obligations to *amici* in their relations with the United States. Compliance with treaty obligations reinforces the principle of reciprocity that is the bedrock of international relations. When *amici* enter into treaties with the United States, they rely on the international law principle that treaties will be followed—the

cardinal rule of *pacta sunt servanda*. And although *amici* are well aware of the federal system of government in the United States, they necessarily depend on the domestic law principle that ensures that treaties will be honored at all levels of government in the United States—the U.S. Constitution's Supremacy Clause, which provides that "all Treaties made ... under the authority of the United States, shall be Supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2.

SUMMARY OF ARGUMENT

Consular relations by nature often involve protection of the interests of individuals. Thus, the Vienna Convention, which codified the law of consular relations, offers significant protections for individuals traveling and living abroad. Consular assistance helps an individual overcome the substantial obstacles he may face in understanding and navigating an unfamiliar criminal justice system. The United States has continuously demonstrated its support for these protections—at the Vienna Convention itself and in cases involving Vienna Convention violations relating to U.S. citizens.

The ICJ has issued several decisions interpreting the Vienna Convention. In particular, it has held that at least in criminal cases involving "severe penalties," judicial remedies must be available to the individual whose rights have been violated. Specifically, the ICJ has ruled that the Vienna Convention creates individually enforceable rights and that judicial remedies for violations of these rights cannot be barred by state procedural default rules. *See Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 128 (Mar. 21); *see also LaGrand Case* (*F.R.G.* v. *U.S.*), 2001 I.C.J. 466 (June 27).

Whether or not the ICJ's *Avena* decision on the interpretation of the Convention binds this Court, principles of reciprocity, comity, and uniformity of treaty interpretation all favor following that decision. The Vienna Convention,

like other treaties, is built on the assumption that all nations will comply. Its drafters anticipated that parties would accord great weight to the ICJ's interpretations and applications of the Convention. This Court's cases concerning treaty interpretation also favor adhering to judicial constructions of treaties rendered by international courts, in recognition of the principle that parties to multilateral treaties desire uniform interpretations of those treaties.

The plain language of the Vienna Convention supports the ICJ's determination that the treaty does create individually enforceable rights. Logic dictates the same result. Despite federal efforts to ensure compliance, violations by state officials persist. Individual judicial remedies for such violations are therefore necessary if these protections are to have their intended effect.

The same principles of reciprocity, comity, and uniformity also support a holding by this Court that state procedural default rules will not bar claims under the Vienna Convention. The ICJ has so concluded and its order is supported by the nature of the right itself. The Vienna Convention requires states to inform detained individuals of their rights; in the case of a violation, the individual will not be informed of his or her rights and cannot be expected to raise such claims at trial. Moreover, the significance of the violation may become clear only after the trial is over.

The Court's opinion accompanying the denial of certiorari in *Breard* v. *Greene*, 523 U.S. 371 (1998) (*per curiam*), which addressed the question of procedural default, should not be followed in these cases. *Breard* did not address the questions of individually enforceable rights and suppression that are also before the Court. Also, the *Breard* opinion was issued before the ICJ had interpreted the Vienna Convention. It has now done so, in two adjudications to which the United States was a party. The ICJ's determination counsels in favor of the renewed assessment of the questions discussed in *Breard*. Moreover, *Breard* was not rendered after full briefing and argument on the merits, but was issued in exigent circumstances immediately before Breard's execu-

tion, and, moreover, the Court's statements about procedural default were not essential to the opinion.

These cases aptly demonstrate the enormous value of the rights secured by Article 36. In *Bustillo*, the Vienna Convention violation prevented Bustillo from securing substantial exculpatory evidence available to the consulate. In *Sanchez-Llamas*, the Vienna Convention violation denied Sanchez-Llamas the opportunity to have consular assistance in understanding his *Miranda* rights; his apparent lack of comprehension led to a confession of questionable reliability.

ARGUMENT

A. Article 36 Is A Critical Part Of The Traditional Consular Function Of Protecting The Interests Of A Sending State's Nationals

An important focus of the consular function is and always has been the protection of the interests of a sending state's nationals who reside in or are visiting a receiving state. Thus, in adopting the Vienna Convention, which codified the principles underlying consular relations, the parties recognized the role of consular relations "in promoting the development of friendly relations among nations, and ensuring the protection and assistance for aliens resident in the territories of other states." *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*U.S.* v. *Iran*), 1980 I.C.J. 3, 40 (May 24) ("*Diplomatic and Consular Staff*").

Article 5 of the Vienna Convention lists various consular functions, many of which advance and protect the interests of the sending state's nationals. Most pertinent to these cases, Article 5(e) states that a central consular function is "helping and assisting nationals, both individuals and bodies corporate, of the sending states." 21 U.S.T. at 83. Article 36 facilitates this "help[]" and "assist[ance]" by prohibiting receiving states from impeding communications between consular officials and nationals of the sending state. Specifically, Article 36(1)(a) provides that "consular officers shall be free to communicate with nationals of the sending State and to have access to them," and that "[n]ationals of the

sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State." *Id.* at 101. Other articles of the Vienna Convention similarly address the interests of individual nationals of sending states. *See, e.g.*, Article 5(d), 21 U.S.T. at 83 (regarding the issuance of travel documents to individuals); Article 5(h), 21 U.S.T. at 83, (respecting the safeguarding of the interests of minors); Article 37, 21 U.S.T. at 102 (concerning assistance in the case of "deaths, guardianship or trusteeship, wrecks and air accidents").

The parties to the Convention anticipated that nationals of sending states would be particularly in need of consular assistance when they were detained on charges in a receiving state. To ensure that their nationals would be able to obtain the benefit of consular assistance in such circumstances, the Convention requires detaining authorities specifically and promptly to inform detained foreign nationals of their right to contact their consulate for assistance:

> [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

Art. 36(1)(b), 21 U.S.T. at 101. Article 36 further provides that consular officers have the right to visit the national in prison "to converse and correspond with him, and to arrange for his legal representation." *Id.* Furthermore, although these rights "shall be exercised in conformity with the laws and regulations of the receiving State," all states' laws and regulations must give "full effect" to the purposes for which the rights at issue were created. *Id.*

These provisions reflect the signatories' judgment that "[d]etained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar." Luke Lee, *Consular Law and Practice* 145 (2d ed. 1991) (quoting U.S. Dep't. of State, Telegram 40298 to Embassy Damascus, Feb. 21, 1975). For example, United States nationals detained abroad may not understand the function of magistrates, who play a much greater role in criminal prosecutions than do judicial officers in the Unites States.[3]

Conversely, detained foreign nationals may find many aspects of the U.S. criminal justice system deeply puzzling. Foreign nationals may not understand the importance of statements given during police interrogations.[4] They also may not understand the function of a public defender or appointed attorney, who represents the client's interests despite being paid by the state. *See Polk County* v. *Dodson*, 454 U.S. 312, 322 (1981). Therefore, they may not meaningfully apprehend the promise of the *Miranda* statement that an attorney will be appointed for a defendant who cannot afford representation. Likewise, they may not understand the central role of plea-bargaining in the U.S. criminal justice system, including the fact that a guilty plea establishes the defendant's guilt just as definitively as a guilty verdict at trial. *See Bradshaw* v. *Stumpf*, 125 S. Ct. 2398, 2405-2407 (1995). And if a foreign national is convicted, it may be ex-

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[3] *See, e.g.*, Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial For an American Murder in the French Cour D'Assises*, 2001 U. Ill. L. Rev. 791, 800-806; *see generally* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506 (1973) (contrasting the Anglo-American adversarial system with the inquisitorial system).

[4] As *amicus* Mexico notes (Br. 10-11), under the laws of some other nations, statements given to the police outside the presence of a magistrate or public prosecutor are not admissible against the defendant at trial. A citizen of such a nation who was detained in the United States might be surprised to discover that his statement to the police may well serve as a crucial piece of evidence against him in a criminal case.

ceptionally difficult for him to understand the process of pursuing an appeal, including whether he needs to obtain new counsel. *Cf. Halbert* v. *Michigan*, 125 S. Ct. 2582, 2592-2593 (2005).

Consular officials can help detained foreign nationals navigate the waters of the criminal justice system and thereby help them secure their rights within that system. Of particular importance is the consulate's ability to help locate culturally sensitive counsel who can translate unfamiliar aspects of the receiving state's criminal justice system to the detained individual. Consular officers also can communicate with the prosecuting authorities, perhaps presenting reasons not to seek the death penalty in capital cases. The consulate can help identify and locate evidence that is in the home country and inaccessible to the detained foreign national's lawyer. Such evidence may include exculpatory evidence or mitigating evidence for use in capital cases (*e.g.*, school records or other evidence about the defendant's early experiences of the kind frequently introduced in capital cases). Finally, consular officials may monitor proceedings to ensure compliance with international standards; indeed, many countries publish specific guidelines for such monitoring.[5]

The importance of these kinds of consular assistance should not be underestimated. The State Department has repeatedly recognized the "essential function" of the Vienna Convention in protections nationals who travel to foreign countries. 7 *Foreign Affairs Manual* § 411 (1984), *available at* http://foia.state.gov/REGS/fams.asp?level=2&id=8&fam=0. The Department explained:

> One of the basic functions of a consular officer is to provide a "cultural bridge" between the host community and the officer's own compatriots traveling

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[5] For example, the State Department's guidelines state that its consular officials must attend trials, protest discrimination, and monitor the well-being of the individual incarcerated. *Consular Law and Practice* 125.

> or residing abroad. No one needs a cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail.

Id. § 401; *see also id.* §§ 400-426.2-1 (2004) (recognizing the role of the consulate in aiding the national unfamiliar with the foreign legal system).

B. Reciprocity, Comity, And Uniform Treaty Interpretation Principles Counsel In Favor Of Adhering To The ICJ's Interpretation Of The Vienna Convention

The U.S. government has argued, to both the ICJ and this Court, that Article 36 of the Convention does not create or secure individual rights, and that a violation of that Article's consular notification provision may not be remedied in the criminal justice system but only through state-to-state adjustment, such as a formal apology.[6] Whatever the merits of these submissions may have been before the *Avena* ruling, they come to this Court in a decidedly different posture now. In *Avena*, the ICJ fully examined and then rejected those contentions. After extensively examining the text and purpose of Article 36, the ICJ concluded that that Article does indeed create "individual rights," and that the detaining state must permit a criminal conviction to be judicially re-examined, where a violation of a detained foreign national's right to consular notification under that Article may have prejudiced him in a criminal prosecution, resulting in "severe penalties." *See Avena*, ¶¶ 139-143.

Reciprocity, comity, and uniformity, which form the underpinnings of international law, favor adherence to the

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[6] *See* Counter-Memorial of The United States of America 74-78, *Case Concerning Avena and Other Mexican Nationals* (*Mex.* v. *U.S.*), (Nov. 3, 2003), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm; Brief for the United States as *Amicus Curiae* 33-38, *Medellin* v. *Dretke*, 125 S. Ct. 2088 (2005) (*per curiam*) (No. 04-5928); *see also Medellin*, 125 S. Ct. at 2104-2105 (O'Connor, J., dissenting).

ICJ's interpretation of the Convention in *Avena*. To reach that conclusion, this Court need not decide that, strictly speaking, either the United States as a general matter or this Court in particular is "bound" by the ICJ's construction of that treaty in cases, such as these, that do not involve the specific individuals at issue in *Avena*. Nor need this Court conclude that the ICJ's reading of the Convention is the only possible correct one. Rather, it is sufficient to observe that the ICJ's decision is entitled to great weight because it is fully consistent with the principles underlying Article 36 in particular and the Convention in general, and it enjoys broad support in the international community—as demonstrated by the significant level of support shown for that decision in *amicus curiae* briefs in this Court.

1. The Vienna Convention—like all treaties—rests on the fundamental norm of reciprocity. This principle lies at the heart of international law and international relations. As this Court has long acknowledged, "international law obligations are of necessity reciprocal in nature." *United States* v. *Arjona*, 120 U.S. 479, 487 (1887); *see also Hilton* v. *Guyot*, 159 U.S. 113, 228 (1895) ("[I]nternational law is founded upon mutuality and reciprocity . . . ."). The heart of this reciprocity principle is the idea that "what is law for one is, under the same circumstances, law for the other." *Arjona*, 140 U.S. at 487. This principle strongly suggests that, where, as here, numerous other parties to the Convention understand a particular practice to be essential to full compliance with the Convention, the United States should adopt that understanding as well. Where "postratification understanding" of other contracting parties supports one reading of a treaty over another, that understanding is to be preferred. *See Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

Reciprocity is a particularly important principle in a multilateral treaty, such as the Convention, that protects the interests of individuals. Millions of American citizens live and travel around the world secure in the belief that agents of their government will be available to assist them in the

event they are detained abroad. They enjoy such security precisely because other nations trust the United States to comply with its treaty obligations in turn and to afford the same protections to their citizens who visit the United States. Should any nation that is a party to the Convention consistently fail to comply with its obligations under that treaty, the mutual trust and sense of obligation underpinning the Convention could unravel.

For its part, the United States has consistently sought to strengthen the protections offered by the Vienna Convention. In cases before the ICJ and elsewhere, the United States has emphasized the vital importance of the safeguards that the Convention offers United States citizens detained by another signatory to the Convention. Thus, when Iran seized the United States embassy and detained embassy personnel, the United States argued to the ICJ in the *Diplomatic and Consular Staff* case that "a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason, the channel of communication between consular officers and nationals must at all times remain open." Memorial of the United States, *Case Concerning United States Diplomatic and Consular Staff in Tehran*, (*U.S.* v. *Iran*), 1980 I.C.J. Pleadings 174 (Jan. 12).

The United States has assertively challenged other governments that fail to provide consular rights to detained American citizens. When Syria detained two United States citizens, the State Department used the Convention to gain access to these individuals. *See* William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 Vand. J. Transnat'l L. 257, 271 (1998). The United States complained of the violation of the Vienna Convention, stating: "The right of governments, through their consular officials, to be informed promptly of the detention of their nationals in foreign states, and to be allowed prompt access to those nationals, is well established in the practice of civilized nations." *Consular Law and Practice* 145. In so doing, it stressed "considerations of re-

ciprocity" and the fact that the United States would certainly abide by its obligations in the reverse scenario. *Id.*[7]

But the United States has also recognized that its concern for protecting the rights of Americans abroad requires it to have a federal policy of attentive support for consular rights domestically. As the State Department has explained to state and local law enforcement agencies:

> The Department of State appreciates the continued cooperation of federal, state, and local law enforcement agencies in helping to ensure that foreign nationals in the United States are treated in accordance with these instructions. Such treatment will permit the United States to comply with its consular legal obligations domestically and to continue to expect rigorous compliance by foreign governments with respect to United States citizens abroad.[8]

2. Closely connected to the reciprocity principle is the principle of comity. Comity has been aptly described as "a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill." *See Société Nationale Industrielle Aerospatiale* v. *United States Dist. Ct.*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part). Comity favors an approach that "furthers, rather than impedes, the development of an ordered international system. A functioning system for solving disputes across borders serves many values, among

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[7] In one case, the United States complained about a Vienna Convention violation—the detention of two Americans for 32 hours—even after the individuals were released. *Consular Law and Practice* 145, 149. The United States' commitment to protecting its citizens' right to consular notification and access is sufficiently deep that the State Department as a matter of policy and procedure requires local consular officials to protest if they learn of an American citizen who is detained without consular notification for more than 72 hours. *See* 7 *Foreign Affairs Manual* § 426.2-1 (2004).

[8] U.S. Dep't of State, *Consular Notification and Access* 13 (2003), *available at* http://travel.state.gov/pdf/CNA_book.pdf.

them predictability, fairness, ease of commercial interactions, and stability through satisfaction of mutual expectations." *Id.* at 557.

The principle of comity favors adherence to the ICJ's interpretation of the Vienna Convention in *Avena*. The Optional Protocol designated the ICJ—a widely respected institution on which the world's leading scholars of international law have served—as a leading institution with competence to adjudicate disagreements between sovereigns about the treaty's proper scope and meaning. Optional Protocol art. 1, 21 U.S.T. at 326. Thus, the drafters of the Convention and the Optional Protocol clearly intended the ICJ to have a leading role in interpreting and applying the Convention. While that role is not exclusive—national courts may frequently have occasion to interpret and apply the Convention—ICJ decisions on the Vienna Convention quite properly have a unique force, for the ICJ represents, in effect, a court of last resort for parties that differ over the meaning of the Convention. Moreover, parties historically have invoked the ICJ's jurisdiction only in cases of surpassing importance, giving its decisions even greater weight.[9] Indeed, when the occasion demanded it, the United States turned to the ICJ to resolve the Article 36 dispute in the *Diplomatic and Consular Staff* case arising out of the seizure of the U.S. Embassy in Teheran.

3. Finally, the principle of uniform treaty interpretation, recognized in several of this Court's treaty cases, favors adherence to interpretations of treaties rendered by foreign and international courts. Thus, even though the United States has withdrawn from the Optional Protocol,

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[9] *See* Gerald P. McGinley, *Ordering a Savage Society: A Study of International Disputes and a Proposal for Achieving Their Peaceful Resolution*, 25 Harv. Int'l L.J. 43, 44-46 (1984) (sovereigns do not invoke the ICJ's jurisdiction lightly); *see also* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 Cal. L. Rev. 1, 34-41 (2005) (compiling data on ICJ action and concluding that states rarely invoke its jurisdiction).

the ICJ's *Avena* decision, rendered while the United States was a party to that Protocol, nonetheless retains strong persuasive force—as indeed it would have even if the United States had never adhered to the Optional Protocol in the first instance. This Court has long paid special heed to treaty interpretations rendered by foreign and international courts. As this Court noted in *Breard*, "we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." 523 U.S. at 375. In cases involving treaty interpretation, it is commonplace for this Court to review and adhere to decisions of foreign courts interpreting the relevant provisions, even though the Court might not be bound by those decisions. *See, e.g., El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155, 175-176 (1999) (noting that decisions rendered by of courts of other signatory nations are entitled to "considerable weight"); *Air France* v. *Saks*, 470 U.S. 392, 402-403 (1985) (same).

One important reason for giving great weight to foreign and international courts' treaty interpretation is that treaty drafters are generally presumed to desire a *uniform* construction of a treaty, and so "their respective courts should strive to interpret the treaty consistently." *Olympic Airways* v. *Husain*, 540 U.S. 644, 661 (2004) (Scalia, J., dissenting). Uniformity of application and interpretation is especially important in a multilateral treaty like the Vienna Convention, which cannot be easily amended if the signatories' interpretations and applications diverge.[10] It would certainly advance the parties' expectation of uniformity for this Court to follow the ICJ's *Avena* decision. A contrary con-

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[10] Given that the policy of uniformity counsels in favor of this Court's following the lead of other countries' courts that have construed a treaty even when no supranational institution is empowered to construe the treaty—as the Court has done in its Warsaw Convention cases—it has even greater import in a case involving the Vienna Convention, where many of the parties to the treaty (including, at the time the treaty was signed, the United States) agreed to establish the ICJ as a leading expositor of the meaning of the treaty.

struction of Article 36 by this Court, by contrast, would greatly undermine the goal of uniformity and would raise the possibility that the United States was in continuing non-compliance with the Convention. *Amici* respectfully submit that, to avoid that prospect, the Court should adopt the ICJ's reading of Article 36.

C. Article 36 Of The Vienna Convention Creates Individually Enforceable Rights

The U.S. government's argument that the consular notification and access provisions of Article 36 do not create individually enforceable rights is difficult to square with the plain language of Article 36(1)(b). That provision first sets forth the requirement that detaining authorities in the receiving state inform the consulate without delay of the detention of one of its nationals (if the detained person so requests). It then requires the detaining authorities to "inform the person concerned without delay of *his rights* under this sub-paragraph." Article 36(1)(b), 21 U.S.T. at 101 (emphasis added.) The drafters of the Convention thus conceived of the consular notification and access requirements as individual rights of detained persons. *See Avena*, ¶¶ 40, 140, 153 (concluding that Article 36 creates individual rights); *see also Breard*, 523 U.S. at 376 (observing that the Convention "arguably confers on an individual the right to consular assistance following arrest"). That is hardly a surprising conclusion, for, as discussed in Section A, *supra*, consular relations by nature often involve protection of the interests of individuals.

If violations of the Vienna Convention were highly infrequent or largely a thing of the past, then there might be little cost to adopting a reading of the Convention that does not create individually enforceable rights. In fact, although the State Department has made commendable efforts to encourage local law enforcement officers to fulfill their Vienna

Convention obligations,[11] those efforts have not yielded the hoped-for results. The numerous reported cases involving allegations of Convention violations suggest that the problem persists.[12] These continued violations have substantial practical import for signatory nations and their nationals in the United States, where state criminal justice proceedings regularly involve foreign nationals. In 2000, over 5% of state prisoners, or more than 56,000 individuals, were not U.S. citizens.[13]

Given that the State Department's outreach efforts have not yielded demonstrable improvement in state compliance, experience teaches that Article 36 will have its intended effect only if judicial remedies are available to individuals whose rights under the Convention have been violated. Local law enforcement authorities, unfortunately, have little incentive to ensure that those rights are scrupulously respected, and may well view the involvement of the consulate as a nuisance. And while the federal government must deal on an ongoing basis with the disappointment of foreign sovereigns whose nationals have not been informed

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[11] In 1998, the State Department issued guidelines to encourage local law enforcement officials to fulfill their Vienna Convention obligations. *See Consular Notification and Access*, *supra* n.8.

[12] *See, e.g.*, *Ramirez* v. *State*, 619 S.E.2d 668, 673 (Ga. 2005); *Sorto* v. *State*, 173 S.W.3d 469 (Tex. Crim. App. 2005), *State* v. *Byron*, 683 N.W.2d 317, 323 (Minn. Ct. App. 2004), *United States* v. *Gonzales*, 339 F.3d 725, 729 (8th Cir. 2003); *United States* v. *Cazares*, 60 Fed. Appx. 223, 226 (10th Cir. 2003) (unpublished); *United States* v. *Guerrero*, 45 Fed. Appx. 265, 266 (4th Cir. 2002) (unpublished); *United States* v. *Ortiz*, 315 F.3d 873, 881 (8th Cir. 2002); *United States* v. *Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002); *United States* v. *Contreras-Cortez*, 41 Fed. Appx. 252, 255 (10th Cir. 2002) (unpublished); *United States* v. *Emuegbunam*, 268 F.3d 377, 387 (6th Cir. 2001); *United States* v. *Felix-Felix*, 275 F.3d 627, 632 (7th Cir. 2001); *United States* v. *Minjares-Alvarez*, 264 F.3d 980, 983 (10th Cir. 2001); *United States* v. *Beckford*, Nos. 97-4924 et al., 2000 U.S. App. LEXIS 6752, at *40 (4th Cir. Jan. 28, 2000) (unpublished).

[13] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 2000, at vi, 8 & tbl. 14, *available at* http://www.ojp.usdoj.gov/bjs/abstract/csfcf00.htm.

of their rights to contact the consular post, the State Department and the Justice Department cannot intervene directly in state criminal prosecutions or sanction local law enforcement officials who decline to observe the Convention's requirements. Only a judicial remedy, therefore, will ensure that detained foreign nationals are promptly informed of their right to contact the consulate—as the Convention unambiguously requires.

Law enforcement officials are no doubt concerned that judicial enforcement of individual rights under the Convention will diminish the prospects for convictions on criminal charges. But *amici* ask the Court to do nothing more than ensure that the Convention's requirements are observed. The Convention exists precisely because its drafters recognized that special concerns arise when a national of one state faces serious criminal charges in the courts of another state. This is as true abroad as it is in the United States. An American citizen detained overseas, especially in an unfamiliar setting, would want reassurance about the nature of the proceedings against him, and the United States government would want to be certain that those proceedings would not result in an unwarranted conviction because the American citizen did not understand that he could ask his consulate for help. So too, the United States' judicial system should ensure that a foreign national, who may speak little or no English and who may be unfamiliar with the American criminal justice system, receives the full measure of assistance available to him. Individual enforcement of the rights secured under Article 36 is necessary to ensure that those rights are consistently honored.

D. The Rights Afforded Under Article 36 Are Not Subject To State Procedural Default Rules

A central question in the *Bustillo* case is whether a defendant should be precluded from challenging his conviction on the ground that his Vienna Convention rights were violated if he did not raise that issue at or before trial. The Virginia courts, applying the state law of procedural default, declined to entertain Bustillo's Vienna Convention claim on

the ground that Bustillo had defaulted on that claim. *Amici* respectfully submit that state procedural default rules should not bar Vienna Convention claims for two reasons: first, enforcing those rules after *Avena* would violate the reciprocity and comity principles discussed above; and second, a procedural default rule is inconsistent with the nature of the right itself.

1. In *Avena*, the ICJ ruled that the Vienna Convention bars the application of state procedural default rules that would preclude judicial review and reconsideration of a criminal conviction against an individual whose rights to consular notification and access were violated. *See Avena*, ¶¶ 112, 121. This Court should follow the ICJ's lead and hold similarly. For the reasons articulated above, the same interests in comity, reciprocity, and uniformity favor a ruling in accordance with that of the ICJ. This Court should rule in a way that gives full effect to the Vienna Convention, reflecting its status as controlling law in the United States and out of respect for the ICJ judgment and interpretation of that treaty.

Although it is certainly true that, ordinarily, even federal constitutional claims are defaulted unless raised at trial, *see Breard*, 523 U.S. at 376, rights based in multilateral treaties such as the Vienna Convention raise different considerations. The application of state procedural default rules to rights grounded in multilateral treaties would raise serious questions about the United States' compliance with international law—especially now that the ICJ has concluded that such procedural default rules may not be applied. In effect, each time that a state court refuses to entertain an otherwise meritorious Vienna Convention claim based on a procedural default rule, that court places the United States in violation of its international obligations as determined by the ICJ, above and beyond the initial violation committed when the foreign national was not informed of his rights as required by Article 36.

This Court should hesitate to approve a regime under which a state court could so readily place the United States

in violation of international law. The Court has frequently stated that international relations and the structure of the Constitution require that the federal government be able to "speak with one voice" in its dealings with other countries. *See, e.g., American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413-414 (2003); *United States* v. *Pink*, 315 U.S. 203, 242 (1942); *see also* The Federalist No. 80, at 535-536 (J. Cooke ed. 1961) (A. Hamilton) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART").

A threat to the United States' relations with other countries can come from state courts no less than from other organs of state governments. This Court has implicitly recognized that fact in its act of state cases. "The act of state doctrine is grounded on judicial concern that *application of customary principles of law* . . . might frustrate the conduct of foreign relations by the political branches of the government." *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 767-768 (1972) (opinion of Rehnquist, J.) (emphasis added); *see Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964). And the Court has not hesitated to find that state courts' application of state law created a potential threat to the federal government's conduct of foreign relations, even when the administration of the day discounted that concern. *See Zschernig* v. *Miller*, 389 U.S. 429, 434 (1968); *Sabbatino*, 376 U.S. at 432-433, 436.

When foreign nations such as *amici* treat with the United States on matters of consular notification or other issues, it is imperative that they have assurances that the United States will comply with its obligations. This compliance includes the individual States and thus requires that individual state procedural default rules—rules that are not even consistent across the country—will not prevent review of claims under the Vienna Convention. This Court therefore should confirm the rule announced more than two hundred years ago in *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 236-237 (1796): "A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way," for courts are under a "declared

duty . . . to determine any Constitution, or laws of any State, contrary to [a treaty] made under the authority of the United States, null and void."

2. State procedural default rules also are inconsistent with the very nature of the rights to consular notification and access. The basis of any claim under Article 36 is that the defendant was not notified of certain rights, as the Convention requires. The reason why the drafters of the Convention required detaining authorities to inform detained individuals of their rights to consular notification and access is that, in all likelihood, such individuals would not know that they had such rights.

It is not an answer to suggest that the defendant's lawyer could have raised any Vienna Convention claim on his behalf at or before trial, and that the lawyer's failure to do so is binding on the defendant. This argument is unpersuasive for at least three reasons.

First, one of the central purposes of the Vienna Convention right is to ensure that consular assistance can help the defendant secure culturally sensitive counsel. Lawyers who are not accustomed to representing foreign nationals may well not understand how the consulate could assist their clients.

Second, this argument assumes that the lawyer should have been aware of the right to contact the consulate under the Vienna Convention. But many lawyers may not be aware of the Vienna Convention's existence or of the possibility that consular assistance is available.

Third, the lawyer's failure to preserve a Vienna Convention claim should not constitute a default because Article 36 rights are personal to the individual. To be sure, the United States' legal system does generally recognize that "the lawyer has—and must have—full authority to manage the conduct of the trial." *See, e.g., Taylor* v. *Illinois*, 484 U.S. 400, 417-418 (1988). But the U.S. criminal justice system also recognizes exceptions to that rule; for example, a lawyer ordinarily may not waive "basic rights," *see id.*, such as the defendant's right to counsel or the right to trial by

jury. *See, e.g., Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988). In those circumstances, the defendant must be specifically and personally advised of his rights, and a "waiver" of those rights without a record that the defendant was made aware of them will not be deemed knowing and voluntary. *See, e.g., Taylor*, 484 U.S. at 418 (requiring "the fully informed and publicly acknowledged consent of the client").

The rights to consular notification and access are of similar dimension. Article 36 requires that notification of the right to consular access be made *to the detained individual*, not to the individual's agent or attorney. Whether to contact the consulate for assistance is a decision for the detained individual to make. Indeed, it would be particularly inappropriate to put the defendant's lawyer in control of that decision. As discussed above, one of the purposes of Article 36 is to ensure that the consulate can assist its detained nationals in finding counsel who apprehends the unique difficulties of representing someone who is not familiar with the U.S. criminal justice system and who can communicate with both the defendant and the consulate about possible lines of investigation.

Finally, Vienna Convention claims should not be subject to procedural default because in many cases it may be impossible to ascertain whether such a claim would be available until after trial. In this regard, Vienna Convention claims are analogous to claims of ineffective assistance of counsel, which, the Court has recognized, present an exception to the rule that claims not raised on direct review may not be raised on collateral review. *See Massaro* v. *United States*, 538 U.S. 500, 504-505 (2003). The Court concluded that "requiring a criminal defendant to bring ineffective-assistance-of-counsel claims on direct appeal does not promote the[] objectives" of conserving judicial resources and respecting final judgments. *Id.* at 504. "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this

purpose." *Id.* at 504-505. Absent factual development, "an appellate court may not be able to ascertain whether the alleged error was prejudicial." *Id* at 505.

The same logic applies to many claims of Vienna Convention violations. In cases where the individual was not made aware of his Vienna Convention rights until after the trial, the impact of the violation may not be apparent from the trial record. Indeed, in many Vienna Convention cases, the central issue will be what is *missing* from the trial record—what facts might have been developed, or what decisions might not have been made, had the consulate been able to intercede. A habeas court would be able to consider such additional facts relevant to assessing the prejudicial effects of the treaty violation. State procedural default rules thus have no place in the analysis of Vienna Convention claims.

E. *Breard* Should Not Be Followed In These Cases

Of the three principal questions presented in these cases—whether Article 36 creates individual rights, whether a suppression remedy is available for violations of those rights, and whether those rights are subject to state procedural default rules—only one, the procedural default issue, was addressed by this Court in its per curiam opinion accompanying the denial of certiorari in *Breard* v. *Greene*, 523 U.S. 371 (1998). *Breard* therefore presents no obstacle to a conclusion by this Court that Article 36 creates individual rights or that a suppression remedy may be available for a violation of those rights.[14]

As to the issue of procedural default, this Court should look past *Breard* because of a fundamental change in the legal landscape in the intervening years: the ICJ's ruling on Article 36. In *Breard*, the Court found it "unfortunate" that no "international court" possessing "jurisdiction to interpret" the Vienna Convention had rendered any relevant in-

[14] In *Breard*, the Court assumed that Article 36 created individual rights. *See* 523 U.S. at 376 ("The Vienna Convention . . . arguably confers on an individual the right to consular assistance following arrest.").

terpretation. 523 U.S. at 375, 378. The Court recognized that if such a decision had been rendered, this Court "should give [it] respectful consideration." *Id.* at 375. In the absence of such prior interpretation, however, the Court noted the provision of the Vienna Convention declaring that the rights enforced by the treaty should be "exercised in conformity with the laws . . . of the receiving state," Vienna Convention, art. 36(2), 21 U.S.T. at 101, and held that this language indicated that state procedural default rules would still be applied. 523 U.S. at 375-376. In the present case, unlike in *Breard*, not only has the ICJ spoken, it has done so after two lengthy and thorough adjudications to which the United States was a party. The "respectful consideration," *id.* at 375, due to the ICJ's interpretation is now a compelling factor, and the *Breard* denial of certiorari should bear much less weight.[15]

Although reaching this conclusion may require departing from *Breard's* statements regarding procedural default, those statements should not be followed here. First, the Court's statement that "Breard procedurally defaulted his claim, if any, under the Vienna Convention," 523 U.S. at 375, was unnecessary to the Court's disposition of that case, since the Court *also* stated that Breard's failure to establish prejudice from any violation of the Vienna Convention was fatal to his claim, *id* at 377.[16] Second, the opinion in *Breard*

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[15] This Court has previously been willing to revise its interpretation of a treaty when additional information bearing on the proper interpretation was brought to its attention. *See United States* v. *Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833).

[16] Indeed, it is not clear that any aspect of *Breard* rests squarely on a ruling about procedural default. In *Breard*, after discussing procedural default generally, the Court stated that Breard was precluded from relief by a federal statute, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). *See Breard*, 523 U.S. at 376-377. This Court concluded that AEDPA "prevent[ed] Breard from establishing that the violation of his Vienna Convention rights prejudiced him," and that "Breard's ability to obtain relief based on violations of the Vienna Convention" was subject to AEDPA because AEDPA was a "subsequently enacted rule." *Id.* at 376. Bustillo's case, however,

accompanied a denial of certiorari, not a decision on the merits after full briefing and argument. While that opinion was more elaborate than the typical order denying certiorari or summarily affirming a lower court decision, the Court has made clear that it has "felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument." *Hohn* v. *United States*, 524 U.S. 236, 251 (1998). Third, the *Breard per curiam* opinion was rendered under especially exigent circumstances, *see Breard*, 523 U.S. at 379-380 (Stevens, J., dissenting), which further counsels against its precedential value.

F. The Importance Of The Right To Consular Notification Is Convincingly Demonstrated In These Cases

Each of these cases forcefully shows the value of consular notification and the potentially grave consequences when the requirement of notification is not observed.

1. Virginia's failure to notify Bustillo of his right to contact the Honduran consulate resulted in Bustillo's failure to obtain critical exculpatory evidence. The theory of the defense at trial was that another person, known as "Sirena") (now known to be Julio Osorto) a Honduran citizen like Bustillo, had in fact been the one to kill the victim by striking him with a baseball bat. The entire case came down to the testimony of five witnesses, three testifying that Bustillo was the killer and two saying that he was not (one of whom identified Sirena as the killer). A defense witness testified that Sirena had fled the U.S. for Honduras shortly after the crime. At the time of trial, the defense was unable to locate or properly identify Sirena.

Since the trial, with the help of the Honduran consulate, Sirena's name has been established, his flight to Honduras (including details specified by the defense witness) con-

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has been brought pursuant to Virginia's *habeas corpus* law, not AEDPA, and so the provisions of AEDPA that might otherwise preclude relief are inapplicable.

firmed, and a videotaped confession of Sirena admitting to striking the victim with a baseball bat has been obtained. Furthermore, police reports reflect that police stopped Sirena near the crime scene, that he falsely told police that he had not been at the crime scene, that Sirena had red stains on his clothes at the time, and that another witness saw Sirena cock a bat to strike the victim. The Honduran consulate has submitted a declaration stating that if it had been aware of Bustillo's case before trial—including the fact that the defense believed another Honduran national had committed the crime—it could have provided valuable assistance to Bustillo. Specifically, it could have supplied immigration records confirming Sirena's flight to Honduras, a photograph of Sirena, and it could have attempted to contact and interview Sirena about the events. Habeas Pet. Exs. 26, 26a, 26b. The ample prejudice to Bustillo that resulted from the Virginia authorities' failure to notify him of his right to contact the consulate is therefore plain: the Honduran consular officials could have obtained evidence that would have crucially bolstered the defense's theory of the case and drastically undercut the prosecution's tactic of mocking Bustillo's theory of the case.

2. The case of Sanchez-Llamas likewise offers a lesson in the importance of the protections offered under the Vienna Convention. Following his arrest and *Miranda* warnings, but absent notification of his rights under the Vienna Convention, Sanchez-Llamas made inculpatory statements to the police. Sanchez-Llamas's confession was then used to convict him.

American citizens are, of course, generally familiar with *Miranda* warnings and their consequences. Indeed, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). A foreign national, however, may well lack this familiarity both with the content of the *Miranda* warnings and their effects in practice; a foreign national also may not apprehend the role of appointed counsel or the fact that a

statement to the police outside the presence of a magistrate or public prosecutor may be admissible at trial. Absent consular notification, Sanchez-Llamas was denied the opportunity to receive consular assistance that could have helped him understand that in the U.S., confessions (regardless of their accuracy) are not necessarily the fastest way out of trouble, as they may be in some countries. Had Sanchez-Llamas been offered consular notification, secured such assistance, and better understood the legal system, he might not have provided a confession, the reliability of which is challenged here.

Each of these cases demonstrates the peril that foreign nationals may face when they encounter an unfamiliar criminal justice system, and each demonstrates why consular assistance is so important in such situations. Because of the authorities' failure to observe Article 36, Bustillo was never apprised of a means by which he could secure crucial exculpatory evidence, and Sanchez-Llamas made inculpatory statements that may well not be reliable. Were a U.S. citizen detained abroad to be placed in such a situation, the United States would have good cause to be troubled by the violation of its national's rights. The same is no less true when the rights of *amici*'s citizens are violated here.

CONCLUSION

The judgments of the Supreme Court of Oregon and the Supreme Court of Virginia in these cases should be reversed.

Respectfully submitted.

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DECEMBER 2005

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SANCHEZ-LLAMAS *v.* OREGON

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 04–10566. Argued March 29, 2006—Decided June 28, 2006*

Article 36(1)(b) of the Vienna Convention on Consular Relations provides that if a person detained by a foreign country "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of his rights under this sub-paragraph." Article 36(2) specifies: "The rights referred to in paragraph 1 . . . shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso . . . that the said laws . . . must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Along with the Convention, the United States ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes, which provides: "Disputes arising out of the . . . Convention shall lie within the compulsory jurisdiction of the International Court of Justice [(ICJ)]." The United States withdrew from the Protocol on March 7, 2005.

Petitioner in No. 04–10566, Moises Sanchez-Llamas, is a Mexican national. When he was arrested after an exchange of gunfire with police, officers did not inform him that he could ask to have the Mexican Consulate notified of his detention. During interrogation, he made incriminating statements regarding the shootout. Before his trial for attempted murder and other offenses, Sanchez-Llamas moved to suppress those statements on the ground, *inter alia*, that the authorities had failed to comply with Article 36. The state court denied that motion and Sanchez-Llamas was convicted and sentenced to prison, and the Oregon Court of Appeals affirmed. The State Su-

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*Together with No. 05–51, *Bustillo* v. *Johnson, Director, Virginia Department of Corrections*, on certiorari to the Supreme Court of Virginia.

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preme Court also affirmed, concluding that Article 36 does not create rights to consular access or notification that a detained individual can enforce in a judicial proceeding.

Petitioner in No. 05–51, Mario Bustillo, a Honduran national, was arrested and charged with murder, but police never informed him that he could request that the Honduran Consulate be notified of his detention. He was convicted and sentenced to prison, and his conviction and sentence were affirmed on appeal. He then filed a habeas petition in state court arguing, for the first time, that authorities had violated his right to consular notification under Article 36. The court dismissed that claim as procedurally barred because he had failed to raise it at trial or on appeal. The Virginia Supreme Court found no reversible error.

Held: Even assuming without deciding that the Convention creates judicially enforceable rights, suppression is not an appropriate remedy for a violation, and a State may apply its regular procedural default rules to Convention claims. Pp. 7–25.

(a) Because petitioners are not in any event entitled to relief, the Court need not resolve whether the Convention grants individuals enforceable rights, but assumes, without deciding, that Article 36 does so. Pp. 7–8.

(b) Neither the Convention itself nor this Court's precedents applying the exclusionary rule support suppression of a defendant's statements to police as a remedy for an Article 36 violation.

The Convention does not mandate suppression or any other specific remedy, but expressly leaves Article 36's implementation to domestic law: Article 36 rights must "be exercised in conformity with the laws . . . of the receiving State." Art. 36(2). Sanchez-Llamas' argument that suppression is appropriate under United States law and should be required under the Court's authority to develop remedies for the enforcement of federal law in state-court criminal proceedings is rejected. "It is beyond dispute that [this Court does] not hold a supervisory power over the [state] courts." *Dickerson* v. *United States*, 530 U. S. 428, 438. The exclusionary rule cases on which Sanchez-Llamas principally relies are inapplicable because they rest on the Court's supervisory authority over federal courts.

The Court's authority to create a judicial remedy applicable in state court must therefore lie, if anywhere, in the treaty itself. Where a treaty provides for a particular judicial remedy, courts must apply it as a requirement of federal law. Cf., *e.g.*, *United States* v. *Giordano*, 416 U. S. 505, 524–525. But where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own. Even if the "full effect" language of Article 36(2) implicitly

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requires a judicial remedy, as Sanchez-Llamas claims, that Article equally requires that Article 36(1) rights be exercised in conformity with domestic law. Under domestic law, the exclusionary rule is not a remedy this Court applies lightly. It has been used primarily to deter certain Fourth and Fifth Amendment violations, including, *e.g.*, unconstitutional searches and seizures, *Mapp* v. *Ohio*, 367 U. S. 643, 655–657, and confessions exacted in violation of the right against compelled self-incrimination or due process, *Dickerson*, *supra*, at 435. In contrast, Article 36 has nothing to do with searches or interrogations and, indeed, does not guarantee defendants *any* assistance at all. It secures for foreign nationals only the right to have their consulate *informed* of their arrest or detention—not to have their consulate intervene, or to have police cease their investigation pending any such notice or intervention. Moreover, the failure to inform a defendant of his Article 36 rights is unlikely, with any frequency, to produce unreliable confessions, see *Watkins* v. *Sowders*, 449 U. S. 341, 347, or to give the police any practical advantage in obtaining incriminating evidence, see *Elkins* v. *United States*, 364 U. S. 206, 217. Suppression would also be a vastly disproportionate remedy for an Article 36 violation. The interests Sanchez-Llamas claims Article 36 advances are effectively protected by other constitutional and statutory requirements, including the right to an attorney and to protection against compelled self-incrimination. Finally, suppression is not the only means of vindicating Article 36 rights. For example, diplomatic avenues—the primary means of enforcing the Vienna Convention—remain open. Pp. 8–15.

(c) States may subject Article 36 claims to the same procedural default rules that apply generally to other federal-law claims.

This question is controlled by the Court's holding in *Breard* v. *Greene*, 523 U. S. 371, 375, that the petitioner's failure to raise an Article 36 claim in state court prevented him from having the claim heard in a subsequent federal habeas proceeding. Bustillo's two reasons why *Breard* does not control are rejected.

First, he argues that *Breard*'s procedural default holding was unnecessary to the result because the petitioner there could not demonstrate prejudice from the default and because, in any event, the later enacted Antiterrorism and Effective Death Penalty Act of 1996 superseded any right the petitioner had under the Vienna Convention to have his claim heard on collateral review. Resolution of the procedural default question, however, was the principal reason for denying the *Breard* petitioner's claim, and the discussion of the issue occupied the bulk of the Court's reasoning. See 523 U. S., at 375–377. It is no answer to argue that the procedural default holding was unnecessary simply because the petitioner had several other ways to lose.

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Second, Bustillo asserts that since *Breard*, the ICJ's *LaGrand* and *Avena* decisions have interpreted the Convention to preclude the application of procedural default rules to Article 36 claims. Although the ICJ's interpretation deserves "respectful consideration," *Breard*, *supra*, at 375, it does not compel the Court to reconsider *Breard*'s understanding of the Convention. "The judicial Power of the United States" is "vested in one supreme Court . . . and . . . inferior courts." U. S. Const., Art. III, §1. That "power . . . extend[s] to . . . treaties," Art. III, §2, and includes the duty "to say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177. If treaties are to be given effect as federal law, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court." *Ibid.* Nothing in the ICJ's structure or purpose suggests that its interpretations were intended to be binding on U. S. courts. Even according "respectful consideration," the ICJ's interpretation cannot overcome the plain import of Article 36(2), which states that the rights it implements "shall be exercised in conformity with the laws . . . of the receiving State." In the United States, this means that the rule of procedural default—which applies even to claimed violations of our own Constitution, see *Engle* v. *Isaac*, 456 U. S. 107, 129—applies also to Vienna Convention claims. Bustillo points to nothing in the drafting history of Article 36 or in the contemporary practice of other Convention signatories that undermines this conclusion. *LaGrand*'s conclusion that applying the procedural default rule denies "full effect" to the purposes of Article 36, by preventing courts from attaching legal significance to an Article 36 violation, is inconsistent with the basic framework of an adversary system. Such a system relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication. See *Castro* v. *United States*, 540 U. S. 375, 386. Procedural default rules generally take on greater importance in an adversary system than in the sort of magistrate-directed, inquisitorial legal system characteristic of many of the other Convention signatories. Under the ICJ's reading of "full effect," Article 36 claims could trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication, such as statutes of limitations and prohibitions against filing successive habeas petitions. This sweeps too broadly, for it reads the "full effect" proviso in a way that leaves little room for the clear instruction in Article 36(2) that Article 36 rights "be exercised in conformity with the laws . . . of the receiving State." A comparison with a suspect's rights under *Miranda* v. *Arizona*, 384 U. S. 436, disposes of Bustillo's "full effect" claim. Although the failure to inform defendants of their

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right to consular notification may prevent them from becoming aware of their Article 36 rights and asserting them at trial, precisely the same thing is true of *Miranda* rights. Nevertheless, if a defendant fails to raise his *Miranda* claim at trial, procedural default rules may bar him from raising the claim in a subsequent postconviction proceeding. *Wainwright* v. *Sykes*, 433 U. S. 72, 87. Bustillo's attempt to analogize an Article 36 claim to a claim under *Brady* v. *Maryland*, 373 U. S. 83, that the prosecution failed to disclose exculpatory evidence is inapt. Finally, his argument that Article 36 claims are most appropriately raised post-trial or on collateral review under *Massaro* v. *United States*, 538 U. S. 500, is rejected. See *Dickerson*, *supra*, at 438. Pp. 15–25.

(d) The Court's holding in no way disparages the Convention's importance. It is no slight to the Convention to deny petitioners' claims under the same principles this Court would apply to claims under an Act of Congress or the Constitution itself. P. 25.

No. 04–10566, 338 Ore. 267, 108 P. 3d 573, and No. 05–51, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment. BREYER, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined, and in which GINSBURG, J., joined as to Part II.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 04–10566 and 05–51

MOISES SANCHEZ-LLAMAS, PETITIONER
04–10566 *v.*
OREGON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

MARIO A. BUSTILLO, PETITIONER
05–51 *v.*
GENE M. JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

[June 28, 2006]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Article 36 of the Vienna Convention on Consular Relations (Vienna Convention or Convention), Apr. 24, 1963, [1970] 21 U. S. T. 77, 100–101, T. I. A. S. No. 6820, addresses communication between an individual and his consular officers when the individual is detained by authorities in a foreign country. These consolidated cases concern the availability of judicial relief for violations of Article 36. We are confronted with three questions. *First*, does Article 36 create rights that defendants may invoke against the detaining authorities in a criminal trial or in a postconviction proceeding? *Second*, does a violation of Article 36 require suppression of a defendant's statements

to police? *Third*, may a State, in a postconviction proceeding, treat a defendant's Article 36 claim as defaulted because he failed to raise the claim at trial? We conclude, even assuming the Convention creates judicially enforceable rights, that suppression is not an appropriate remedy for a violation of Article 36, and that a State may apply its regular rules of procedural default to Article 36 claims. We therefore affirm the decisions below.

I

A

The Vienna Convention was drafted in 1963 with the purpose, evident in its preamble, of "contribut[ing] to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." 21 U. S. T., at 79. The Convention consists of 79 articles regulating various aspects of consular activities. At present, 170 countries are party to the Convention. The United States, upon the advice and consent of the Senate, ratified the Convention in 1969. *Id.*, at 77.

Article 36 of the Convention concerns consular officers' access to their nationals detained by authorities in a foreign country. The article provides that "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." Art. 36(1)(b), *id.*, at 101.[1] In other words, when a national of

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[1] In its entirety, Article 36 of the Vienna Convention states:

"1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

"(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

"(b) if he so requests, the competent authorities of the receiving State

one country is detained by authorities in another, the authorities must notify the consular officers of the detainee's home country if the detainee so requests. Article 36(1)(b) further states that "[t]he said authorities shall inform the person concerned [*i.e.*, the detainee] without delay of his rights under this sub-paragraph." *Ibid.* The Convention also provides guidance regarding how these requirements, and the other requirements of Article 36, are to be implemented:

> "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Art. 36(2), *ibid.*

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shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

"(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

"2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." 21 U. S. T., at 100–101.

Along with the Vienna Convention, the United States ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol or Protocol), Apr. 24, 1963, [1970] 21 U. S. T. 325, T. I. A. S. No. 6820. The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice [(ICJ)]," and allows parties to the Protocol to bring such disputes before the ICJ. *Id.*, at 326. The United States gave notice of its withdrawal from the Optional Protocol on March 7, 2005. Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations.

B

Petitioner Moises Sanchez-Llamas is a Mexican national. In December 1999, he was involved in an exchange of gunfire with police in which one officer suffered a gunshot wound in the leg. Police arrested Sanchez-Llamas and gave him warnings under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), in both English and Spanish. At no time, however, did they inform him that he could ask to have the Mexican Consulate notified of his detention.

Shortly after the arrest and *Miranda* warnings, police interrogated Sanchez-Llamas with the assistance of an interpreter. In the course of the interrogation, Sanchez-Llamas made several incriminating statements regarding the shootout with police. He was charged with attempted aggravated murder, attempted murder, and several other offenses. Before trial, Sanchez-Llamas moved to suppress the statements he made to police. He argued that suppression was warranted because the statements were made involuntarily and because the authorities had failed to comply with Article 36 of the Vienna Convention. The trial court denied the motion. The case proceeded to trial, and Sanchez-Llamas was convicted and sentenced to 20½

years in prison.

He appealed, again arguing that the Vienna Convention violation required suppression of his statements. The Oregon Court of Appeals affirmed. Judgt. order reported at 191 Ore. App. 399, 84 P. 3d 1133 (2004). The Oregon Supreme Court also affirmed, concluding that Article 36 "does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding." 338 Ore. 267, 276, 108 P. 3d 573, 578 (2005) (en banc). We granted certiorari. 546 U. S. ___ (2005).

C

Petitioner Mario Bustillo, a Honduran national, was with several other men at a restaurant in Springfield, Virginia, on the night of December 10, 1997. That evening, outside the restaurant, James Merry was struck in the head with a baseball bat as he stood smoking a cigarette. He died several days later. Several witnesses at the scene identified Bustillo as the assailant. Police arrested Bustillo the morning after the attack and eventually charged him with murder. Authorities never informed him that he could request to have the Honduran Consulate notified of his detention.

At trial, the defense pursued a theory that another man, known as "Sirena," was responsible for the attack. Two defense witnesses testified that Bustillo was not the killer. One of the witnesses specifically identified the attacker as Sirena. In addition, a third defense witness stated that she had seen Sirena on a flight to Honduras the day after the victim died. In its closing argument before the jury, the prosecution dismissed the defense theory about Sirena. See App. in No. 05–51, p. 21 ("This whole Sirena thing, I don't want to dwell on it too much. It's very convenient that Mr. Sirena apparently isn't available"). A jury convicted Bustillo of first-degree murder, and he was sentenced to 30 years in prison. His conviction and sen-

tence were affirmed on appeal.

After his conviction became final, Bustillo filed a petition for a writ of habeas corpus in state court. There, for the first time, he argued that authorities had violated his right to consular notification under Article 36 of the Vienna Convention. He claimed that if he had been advised of his right to confer with the Honduran Consulate, he "would have done so without delay." App. in No. 05–51, p. 60. Moreover, the Honduran Consulate executed an affidavit stating that "it would have endeavoured to help Mr. Bustillo in his defense" had it learned of his detention prior to trial. *Id.*, at 74. Bustillo insisted that the consulate could have helped him locate Sirena prior to trial. His habeas petition also argued, as part of a claim of ineffective assistance of counsel, that his attorney should have advised him of his right to notify the Honduran Consulate of his arrest and detention.[2]

The state habeas court dismissed Bustillo's Vienna Convention claim as "procedurally barred" because he had failed to raise the issue at trial or on appeal. App. to Pet. for Cert. in No. 05–51, p. 43a. The court also denied Bustillo's claim of ineffective assistance of counsel, ruling that

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[2]Bustillo's habeas petition also presented newly acquired evidence that tended to cast doubt on his conviction. Most notably, he produced a secretly recorded videotape in which Sirena admitted killing Merry and stated that Bustillo had been wrongly convicted. App. in No. 05–51, pp. 38, 54. In addition, Bustillo argued that the prosecution violated *Brady* v. *Maryland*, 373 U. S. 83 (1963), by failing to disclose that on the night of the crime, police had questioned a man named "Julio C. Osorto," who is now known to be the same man as "Sirena." The police report concerning the encounter stated that Sirena appeared to have ketchup on his pants. Bustillo contends that these stains might in fact have been the victim's blood. The Commonwealth disputes this. The state habeas court found "no evidence of any transfer of the victim's blood to the assailant," and concluded that the undisclosed encounter between police and Sirena was not material under *Brady*. App. in No. 05–51, p. 167.

his belated claim that counsel should have informed him of his Vienna Convention rights was barred by the applicable statute of limitations and also meritless under *Strickland* v. *Washington*, 466 U. S. 668 (1984). App. in No. 05–51, p. 132. In an order refusing Bustillo's petition for appeal, the Supreme Court of Virginia found "no reversible error" in the habeas court's dismissal of the Vienna Convention claim. App. to Pet. for Cert. in No. 05–51, p. 1a. We granted certiorari to consider the Vienna Convention issue. 546 U. S. ___ (2005).

II

We granted certiorari as to three questions presented in these cases: (1) whether Article 36 of the Vienna Convention grants rights that may be invoked by individuals in a judicial proceeding; (2) whether suppression of evidence is a proper remedy for a violation of Article 36; and (3) whether an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial.

As a predicate to their claims for relief, Sanchez-Llamas and Bustillo each argue that Article 36 grants them an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification. Respondents and the United States, as *amicus curiae*, strongly dispute this contention. They argue that "there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts." Brief for United States 11; *ibid.* (quoting *Head Money Cases*, 112 U. S. 580, 598 (1884) (a treaty "'is primarily a compact between independent nations,'" and "'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it'")). Because we conclude that Sanchez-Llamas and Bustillo are not in any event entitled

to relief on their claims, we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights. Therefore, for purposes of addressing petitioners' claims, we assume, without deciding, that Article 36 does grant Bustillo and Sanchez-Llamas such rights.

A

Sanchez-Llamas argues that the trial court was required to suppress his statements to police because authorities never told him of his rights under Article 36. He refrains, however, from arguing that the Vienna Convention itself mandates suppression. We think this a wise concession. The Convention does not prescribe specific remedies for violations of Article 36. Rather, it expressly leaves the implementation of Article 36 to domestic law: Rights under Article 36 are to "be exercised in conformity with the laws and regulations of the receiving State." Art. 36(2), 21 U. S. T., at 101. As far as the text of the Convention is concerned, the question of the availability of the exclusionary rule for Article 36 violations is a matter of domestic law.

It would be startling if the Convention were read to require suppression. The exclusionary rule as we know it is an entirely American legal creation. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 415 (1971) (Burger, C. J., dissenting) (the exclusionary rule "is unique to American jurisprudence"). More than 40 years after the drafting of the Convention, the automatic exclusionary rule applied in our courts is still "universally rejected" by other countries. Bradley, *Mapp* Goes Abroad, 52 Case W. Res. L. Rev. 375, 399–400 (2001); see also *Zicherman* v. *Korean Air Lines Co.*, 516 U. S. 217, 226 (1996) (postratification understanding "traditionally considered" as an aid to treaty interpretation). It is implausible that other signatories to the Convention thought it to require a remedy that

nearly all refuse to recognize as a matter of domestic law. There is no reason to suppose that Sanchez-Llamas would be afforded the relief he seeks here in any of the other 169 countries party to the Vienna Convention.[3]

For good reason then, Sanchez-Llamas argues only that suppression is required because it is the appropriate remedy for an Article 36 violation under United States law, and urges us to require suppression for Article 36 violations as a matter of our "authority to develop remedies for the enforcement of federal law in state-court criminal proceedings." Reply Brief for Petitioner in No.

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[3]See Declaration of Ambassador Maura A. Harty, Annex 4 to Counter-Memorial of the United States in *Case Concerning Avena and other Mexican Nationals (Mex. v. U. S.)*, 2004 I. C. J. No. 128, p. A386, ¶41 (Oct. 25, 2003) (Harty Declaration) ("With the possible exception of Brazil, we are not aware of a single country that has a law, regulation or judicial decision requiring that a statement taken before consular notification and access automatically must be excluded from use at trial" (footnote omitted)). According to the Harty Declaration, the American Embassy in Brazil has been advised that Brazil considers consular notification to be a right under the Brazilian Constitution. Neither the declaration nor the parties point to a case in which a Brazilian court has suppressed evidence because of a violation of that right.

In a few cases, as several *amici* point out, the United Kingdom and Australia appear to have applied a discretionary rule of exclusion for violations of domestic statutes implementing the Vienna Convention. See Brief for United States as *Amicus Curiae* 26, and n. 9; Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 16–23. The dissent similarly relies on two cases from Australia, *post*, at 32 (opinion of BREYER, J.) (citing *Tan Seng Kiah* v. *Queen* (2001) 160 F. L. R. 26 (Ct. Crim. App. N. Terr.) and *Queen* v. *Tan* [2001] W. A. S. C. 275 (Sup. Ct. W. Australia in Crim.)), where consular notification rights are governed by a domestic statute that provides rights beyond those required by Article 36 itself. See Crimes Act, No. 12, 1914, §23p (Australia). The Canadian case on which the dissent relies, *post*, at 32, denied suppression, and concerned only the court's general discretionary authority to exclude a confession "whose admission would adversely affect the fairness of an accused's trial." *Queen* v. *Partak* [2001] 160 C. C. C. 3d 553, ¶61 (Ont. Super. Ct. of J.).

04–10566, p. 11.

For their part, the State of Oregon and the United States, as *amicus curiae*, contend that we lack any such authority over state-court proceedings. They argue that our cases suppressing evidence obtained in violation of federal statutes are grounded in our supervisory authority over the federal courts—an authority that does not extend to state-court proceedings. Brief for Respondent in No. 04–10566, pp. 42–43; Brief for United States 32–34; see *McNabb* v. *United States*, 318 U. S. 332, 341 (1943) (suppressing evidence for violation of federal statute requiring persons arrested without a warrant to be promptly presented to a judicial officer); *Mallory* v. *United States*, 354 U. S. 449 (1957) (suppressing evidence for violation of similar requirement of Fed. Rule Crim. Proc. 5(a)); *Miller* v. *United States*, 357 U. S. 301 (1958) (suppressing evidence obtained incident to an arrest that violated 18 U. S. C. §3109). Unless required to do so by the Convention itself, they argue, we cannot direct Oregon courts to exclude Sanchez-Llamas' statements from his criminal trial.

To the extent Sanchez-Llamas argues that we should invoke our supervisory authority, the law is clear: "It is beyond dispute that we do not hold a supervisory power over the courts of the several States." *Dickerson* v. *United States*, 530 U. S. 428, 438 (2000); see also *Smith* v. *Phillips*, 455 U. S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension"). The cases on which Sanchez-Llamas principally relies are inapplicable in light of the limited reach of our supervisory powers. *Mallory* and *McNabb* plainly rest on our supervisory authority. *Mallory*, *supra*, at 453; *McNabb*, *supra*, at 340. And while *Miller* is not clear about its authority for requiring suppression, we have understood it to have a similar basis. See *Ker* v. *California*, 374 U. S. 23, 31 (1963).

We also agree with the State of Oregon and the United States that our authority to create a judicial remedy applicable in state court must lie, if anywhere, in the treaty itself. Under the Constitution, the President has the power, "by and with the Advice and Consent of the Senate, to make Treaties." Art. II, §2, cl. 2. The United States ratified the Convention with the expectation that it would be interpreted according to its terms. See Restatement (Third) of Foreign Relations Law of the United States §325(1) (1986) ("An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose"). If we were to require suppression for Article 36 violations without some authority in the Convention, we would in effect be supplementing those terms by enlarging the obligations of the United States under the Convention. This is entirely inconsistent with the judicial function. Cf. *The Amiable Isabella*, 6 Wheat. 1, 71 (1821) (Story, J.) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty").

Of course, it is well established that a self-executing treaty binds the States pursuant to the Supremacy Clause, and that the States therefore must recognize the force of the treaty in the course of adjudicating the rights of litigants. See, *e.g.*, *Hauenstein* v. *Lynham*, 100 U. S. 483 (1880). And where a treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States or the other federal branches. Courts must apply the remedy as a requirement of federal law. Cf. 18 U. S. C. §2515; *United States* v. *Giordano*, 416 U. S. 505, 524–525 (1974). But where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States

through lawmaking of their own.

Sanchez-Llamas argues that the language of the Convention implicitly requires a judicial remedy because it states that the laws and regulations governing the exercise of Article 36 rights "must enable *full effect* to be given to the purposes for which the rights . . . are intended," Art. 36(2), 21 U. S. T., at 101 (emphasis added). In his view, although "full effect" may not automatically require an exclusionary rule, it does require an appropriate judicial remedy of *some* kind. There is reason to doubt this interpretation. In particular, there is little indication that other parties to the Convention have interpreted Article 36 to require a judicial remedy in the context of criminal prosecutions. See Department of State Answers to Questions Posed by the First Circuit in *United States* v. *Nai Fook Li*, No. 97–2034 etc., p. A–9 (Oct. 15, 1999) ("We are unaware of any country party to the [Vienna Convention] that provides remedies for violations of consular notification through its domestic criminal justice system").

Nevertheless, even if Sanchez-Llamas is correct that Article 36 implicitly requires a judicial remedy, the Convention equally states that Article 36 rights "shall be exercised in conformity with the laws and regulations of the receiving State." Art. 36(2), 21 U. S. T., at 101. Under our domestic law, the exclusionary rule is not a remedy we apply lightly. "[O]ur cases have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule." *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 364–365 (1998). Because the rule's social costs are considerable, suppression is warranted only where the rule's "'remedial objectives are thought most efficaciously served.'" *United States* v. *Leon*, 468 U. S. 897, 908 (1984) (quoting *United States* v. *Calandra*, 414 U. S. 338, 348 (1974)).

We have applied the exclusionary rule primarily to deter

constitutional violations. In particular, we have ruled that the Constitution requires the exclusion of evidence obtained by certain violations of the Fourth Amendment, see *Taylor* v. *Alabama*, 457 U. S. 687, 694 (1982) (arrests in violation of the Fourth Amendment); *Mapp* v. *Ohio*, 367 U. S. 643, 655–657 (1961) (unconstitutional searches and seizures), and confessions exacted by police in violation of the right against compelled self-incrimination or due process, see *Dickerson*, 530 U. S., at 435 (failure to give *Miranda* warnings); *Payne* v. *Arkansas*, 356 U. S. 560, 568 (1958) (involuntary confessions).

The few cases in which we have suppressed evidence for statutory violations do not help Sanchez-Llamas. In those cases, the excluded evidence arose directly out of statutory violations that implicated important Fourth and Fifth Amendment interests. *McNabb*, for example, involved the suppression of incriminating statements obtained during a prolonged detention of the defendants, in violation of a statute requiring persons arrested without a warrant to be promptly presented to a judicial officer. We noted that the statutory right was intended to "avoid all the evil implications of secret interrogation of persons accused of crime," 318 U. S., at 344, and later stated that *McNabb* was "responsive to the same considerations of Fifth Amendment policy that . . . face[d] us . . . as to the states" in *Miranda*, 384 U. S., at 463. Similarly, in *Miller*, we required suppression of evidence that was the product of a search incident to an unlawful arrest. 357 U. S., at 305; see *California* v. *Hodari D.*, 499 U. S. 621, 624 (1991) ("We have long understood that the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person").

The violation of the right to consular notification, in contrast, is at best remotely connected to the gathering of evidence. Article 36 has nothing whatsoever to do with searches or interrogations. Indeed, Article 36 does not

guarantee defendants *any* assistance at all. The provision secures only a right of foreign nationals to have their consulate *informed* of their arrest or detention—not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention. In most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police.

Moreover, the reasons we often require suppression for Fourth and Fifth Amendment violations are entirely absent from the consular notification context. We require exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable. *Watkins* v. *Sowders*, 449 U. S. 341, 347 (1981). We exclude the fruits of unreasonable searches on the theory that without a strong deterrent, the constraints of the Fourth Amendment might be too easily disregarded by law enforcement. *Elkins* v. *United States*, 364 U. S. 206, 217 (1960). The situation here is quite different. The failure to inform a defendant of his Article 36 rights is unlikely, with any frequency, to produce unreliable confessions. And unlike the search-and-seizure context—where the need to obtain valuable evidence may tempt authorities to transgress Fourth Amendment limitations—police win little, if any, practical advantage from violating Article 36. Suppression would be a vastly disproportionate remedy for an Article 36 violation.

Sanchez-Llamas counters that the failure to inform defendants of their right to consular notification gives them "a misleadingly incomplete picture of [their] legal options," Brief for Petitioner in No. 04–10566, p. 42, and that suppression will give authorities an incentive to abide by Article 36.

Leaving aside the suggestion that it is the role of police generally to advise defendants of their legal options, we think other constitutional and statutory requirements

effectively protect the interests served, in Sanchez-Llamas' view, by Article 36. A foreign national detained on suspicion of crime, like anyone else in our country, enjoys under our system the protections of the Due Process Clause. Among other things, he is entitled to an attorney, and is protected against compelled self-incrimination. See *Wong Wing* v. *United States*, 163 U. S. 228, 238 (1896) ("[A]ll persons within the territory of the United States are entitled to the protection guaranteed by" the Fifth and Sixth Amendments). Article 36 adds little to these "legal options," and we think it unnecessary to apply the exclusionary rule where other constitutional and statutory protections—many of them already enforced by the exclusionary rule—safeguard the same interests Sanchez-Llamas claims are advanced by Article 36.

Finally, suppression is not the only means of vindicating Vienna Convention rights. A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police. If he raises an Article 36 violation at trial, a court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance. Of course, diplomatic avenues—the primary means of enforcing the Convention—also remain open.

In sum, neither the Vienna Convention itself nor our precedents applying the exclusionary rule support suppression of Sanchez-Llamas' statements to police.

B

The Virginia courts denied petitioner Bustillo's Article 36 claim on the ground that he failed to raise it at trial or on direct appeal. The general rule in federal habeas cases is that a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review. See *Massaro* v. *United States*, 538 U. S. 500, 504 (2003); *Bousley* v. *United States*, 523 U. S. 614, 621 (1998).

There is an exception if a defendant can demonstrate both "cause" for not raising the claim at trial, and "prejudice" from not having done so. *Massaro, supra,* at 504. Like many States, Virginia applies a similar rule in state post-conviction proceedings, and did so here to bar Bustillo's Vienna Convention claim. Normally, in our review of state-court judgments, such rules constitute an adequate and independent state-law ground preventing us from reviewing the federal claim. *Coleman* v. *Thompson,* 501 U. S. 722, 729 (1991). Bustillo contends, however, that state procedural default rules cannot apply to Article 36 claims. He argues that the Convention requires that Article 36 rights be given "'full effect'" and that Virginia's procedural default rules "prevented any effect (much less 'full effect') from being given to" those rights. Brief for Petitioner in No. 05–51, p. 35.

This is not the first time we have been asked to set aside procedural default rules for a Vienna Convention claim. Respondent Johnson and the United States persuasively argue that this question is controlled by our decision in *Breard* v. *Greene,* 523 U. S. 371 (1998) *(per curiam).* In *Breard,* the petitioner failed to raise an Article 36 claim in state court—at trial or on collateral review—and then sought to have the claim heard in a subsequent federal habeas proceeding. *Id.,* at 375. He argued that "the Convention is the 'supreme law of the land' and thus trumps the procedural default doctrine." *Ibid.* We rejected this argument as "plainly incorrect," for two reasons. *Ibid.* First, we observed, "it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Ibid.* Furthermore, we reasoned that while treaty protections such as Article 36 may constitute supreme federal law, this is "no less true of provisions of the Constitution itself, to which rules of procedural default apply." *Id.,* at

376. In light of *Breard*'s holding, Bustillo faces an uphill task in arguing that the Convention requires States to set aside their procedural default rules for Article 36 claims.

Bustillo offers two reasons why *Breard* does not control his case. He first argues that *Breard*'s holding concerning procedural default was "unnecessary to the result," Brief for Petitioner in No. 05–51, p. 45, because the petitioner there could not demonstrate prejudice from the default and because, in any event, a subsequent federal statute—the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214—superseded any right the petitioner had under the Vienna Convention to have his claim heard on collateral review. We find Bustillo's contention unpersuasive. Our resolution of the procedural default question in *Breard* was the principal reason for the denial of the petitioner's claim, and the discussion of the issue occupied the bulk of our reasoning. See 523 U. S., at 375–377. It is no answer to argue, as Bustillo does, that the holding in *Breard* was "unnecessary" simply because the petitioner in that case had several ways to lose. See *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 340 (1928).

Bustillo's second reason is less easily dismissed. He argues that since *Breard*, the ICJ has interpreted the Vienna Convention to preclude the application of procedural default rules to Article 36 claims. The *LaGrand Case (F. R. G.* v. *U. S.)*, 2001 I. C. J. 466 (Judgment of June 27) *(LaGrand)*, and the *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128 (Judgment of Mar. 31) *(Avena)*, were brought before the ICJ by the governments of Germany and Mexico, respectively, on behalf of several of their nationals facing death sentences in the United States. The foreign governments claimed that their nationals had not been informed of their right to consular notification. They further argued that application of the procedural default rule to their nationals' Vienna Convention claims failed to give

"full effect" to the purposes of the Convention, as required by Article 36. The ICJ agreed, explaining that the defendants had procedurally defaulted their claims "because of the failure of the American authorities to comply with their obligation under Article 36." *LaGrand*, *supra*, at 497, ¶91; see also *Avena*, *supra*, ¶113. Application of the procedural default rule in such circumstances, the ICJ reasoned, "prevented [courts] from attaching any legal significance" to the fact that the violation of Article 36 kept the foreign governments from assisting in their nationals' defense. *LaGrand*, *supra*, at 497, ¶91; see also *Avena*, *supra*, ¶113.

Bustillo argues that *LaGrand* and *Avena* warrant revisiting the procedural default holding of *Breard*. In a similar vein, several *amici* contend that "the United States is *obligated* to comply with the Convention, *as interpreted by the ICJ*." Brief for ICJ Experts 11 (emphases added). We disagree. Although the ICJ's interpretation deserves "respectful consideration," *Breard*, *supra*, at 375, we conclude that it does not compel us to reconsider our understanding of the Convention in *Breard*.[4]

Under our Constitution, "[t]he judicial Power of the United States" is "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, §1. That "judicial Power . . . extend[s] to . . . Treaties." *Id.*, §2. And, as Chief Justice Marshall famously explained, that judicial power

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[4]The dissent, in light of *LaGrand* and *Avena*, "would read *Breard* . . . as not saying that the Convention *never* trumps any procedural default rule." *Post*, at 26 (opinion of BREYER, J.). This requires more than "reading an exception into *Breard*'s language," *post*, at 27, amounting instead to overruling *Breard*'s plain holding that the Convention does not trump the procedural default doctrine. While the appeal of such a course to a *Breard* dissenter may be clear, see 523 U. S., at 380 (BREYER, J., dissenting), "respectful consideration" of precedent should begin at home.

includes the duty "to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court" established by the Constitution. *Ibid.*; see also *Williams* v. *Taylor*, 529 U. S. 362, 378–379 (2000) (opinion of STEVENS, J.) ("At the core of [the judicial] power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law"). It is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ.

Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.[5] The ICJ's decisions have "*no binding force*

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[5]The dissent's extensive list of lower court opinions that have "looked to the ICJ for guidance," *post*, at 21–22, is less impressive than first appears. Many of the cited opinions merely refer to, or briefly describe, ICJ decisions without in any way relying on them as authority. See, *e.g.*, *Committee of United States Citizens Living in Nicaragua* v. *Reagan*, 859 F. 2d 929, 932, 935 (CADC 1988); *Conservation Law Foundation of New England* v. *Secretary of Interior*, 790 F. 2d 965, 967 (CA1 1986); *Narenji* v. *Civiletti*, 617 F. 2d 745, 748 (CADC 1979); *Diggs* v. *Richardson*, 555 F. 2d 848, 849 (CADC 1976); *Rogers* v. *Societe Internationale Pour Participations Industrielles et Commerciales, S. A.*, 278 F. 2d 268, 273, n. 3 (CADC 1960) (Fahy, J., dissenting). Others cite ICJ opinions alongside law review articles for general propositions about international law. See, *e.g.*, *McKesson Corp.* v. *Islamic Republic of Iran*, 52 F. 3d 346, 352 (CADC 1995); *Princz* v. *Federal Republic of Germany*, 26 F. 3d 1166, 1180, 1184 (CADC 1994) (Wald, J., dissenting); *Sadat* v. *Mertes*, 615 F. 2d 1176, 1187, n. 14 (CA7 1980); *United States* v. *Postal*, 589 F. 2d 862, 869 (CA5 1979). Moreover, all but two of the cited decisions from this Court concern technical issues of boundary demarcation. See *post*, at 21.

except between the parties and in respect of that particular case," Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T. S. No. 993 (1945) (emphasis added). Any interpretation of law the ICJ renders in the course of resolving particular disputes is thus not binding precedent *even as to the ICJ itself;* there is accordingly little reason to think that such interpretations were intended to be controlling on our courts. The ICJ's principal purpose is to arbitrate particular disputes between national governments. *Id.*, at 1055 (ICJ is "the principal judicial organ of the United Nations"); see also Art. 34, *id.*, at 1059 ("Only states [*i.e.*, countries] may be parties in cases before the Court"). While each member of the United Nations has agreed to comply with decisions of the ICJ "in any case to which it is a party," United Nations Charter, Art. 94(1), 59 Stat. 1051, T. S. No. 933 (1945), the Charter's procedure for noncompliance—referral to the Security Council by the aggrieved state—contemplates quintessentially *international* remedies, Art. 94(2), *ibid.*

In addition, "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Kolovrat* v. *Oregon*, 366 U. S. 187, 194 (1961). Although the United States has agreed to "discharge its international obligations" in having state courts give effect to the decision in *Avena*, it has not taken the view that the ICJ's interpretation of Article 36 is binding on our courts. President Bush, Memorandum for the Attorney General (Feb. 28, 2005), App. to Brief for United States as *Amicus Curiae* in *Medellín* v. *Dretke*, O. T. 2004, No. 04–5928, p. 9a. Moreover, shortly after *Avena*, the United States withdrew from the Optional Protocol concerning Vienna Convention disputes. Whatever the effect of *Avena* and *LaGrand* before this withdrawal, it is doubtful that our courts should give decisive weight to the interpretation of a

tribunal whose jurisdiction in this area is no longer recognized by the United States.

LaGrand and *Avena* are therefore entitled only to the "respectful consideration" due an interpretation of an international agreement by an international court. *Breard*, 523 U. S., at 375. Even according such consideration, the ICJ's interpretation cannot overcome the plain import of Article 36. As we explained in *Breard*, the procedural rules of domestic law generally govern the implementation of an international treaty. *Ibid.* In addition, Article 36 makes clear that the rights it provides "shall be exercised in conformity with the laws and regulations of the receiving State" provided that "full effect . . . be given to the purposes for which the rights accorded under this Article are intended." Art. 36(2), 21 U. S. T., at 101. In the United States, this means that the rule of procedural default—which applies even to claimed violations of our Constitution, see *Engle* v. *Isaac*, 456 U. S. 107, 129 (1982)—applies also to Vienna Convention claims. Bustillo points to nothing in the drafting history of Article 36 or in the contemporary practice of other signatories that undermines this conclusion.

The ICJ concluded that where a defendant was not notified of his rights under Article 36, application of the procedural default rule failed to give "full effect" to the purposes of Article 36 because it prevented courts from attaching "legal significance" to the Article 36 violation. *LaGrand*, 2001 I. C. J., at 497–498, ¶¶90–91. This reasoning overlooks the importance of procedural default rules in an adversary system, which relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication. See *Castro* v. *United States*, 540 U. S. 375, 386 (2003) (SCALIA, J., concurring in part and concurring in judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and

are responsible for advancing the facts and arguments entitling them to relief"). Procedural default rules are designed to encourage parties to raise their claims promptly and to vindicate "the law's important interest in the finality of judgments." *Massaro*, 538 U. S., at 504. The consequence of failing to raise a claim for adjudication at the proper time is generally forfeiture of that claim. As a result, rules such as procedural default routinely deny "legal significance"—in the *Avena* and *LaGrand* sense—to otherwise viable legal claims.

Procedural default rules generally take on greater importance in an adversary system such as ours than in the sort of magistrate-directed, inquisitorial legal system characteristic of many of the other countries that are signatories to the Vienna Convention. "What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties." *McNeil* v. *Wisconsin*, 501 U. S. 171, 181, n. 2 (1991). In an inquisitorial system, the failure to raise a legal error can in part be attributed to the magistrate, and thus to the state itself. In our system, however, the responsibility for failing to raise an issue generally rests with the parties themselves.

The ICJ's interpretation of Article 36 is inconsistent with the basic framework of an adversary system. Under the ICJ's reading of "full effect," Article 36 claims could trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication. If the State's failure to inform the defendant of his Article 36 rights generally excuses the defendant's failure to comply with relevant procedural rules, then presumably rules such as statutes of limitations and prohibitions against filing successive habeas petitions must also yield in the

face of Article 36 claims. This sweeps too broadly, for it reads the "full effect" proviso in a way that leaves little room for Article 36's clear instruction that Article 36 rights "shall be exercised in conformity with the laws and regulations of the receiving State." Art. 36(2), 21 U. S. T., at 101.[6]

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[6]The dissent would read the ICJ's decisions to require that procedural default rules give way only where "the State is unwilling to provide some other effective remedy, for example (if the lawyer acts incompetently in respect to Convention rights of which the lawyer was aware) an ineffective-assistance-of-counsel claim." *Post*, at 25 (opinion of BREYER, J.). But both *LaGrand* and *Avena* indicate that the availability of a claim of ineffective assistance of counsel is *not* an adequate remedy for an Article 36 violation. See *LaGrand Case (F. R. G. v. U. S.)*, 2001 I. C. J. 466, 497, ¶91 (Judgment of June 27) (requiring suspension of state procedural default rule even though "United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards"); see also *Case Concerning Avena and other Mexican Nationals (Mex. v. U. S.)*, 2004 I. C. J. No. 128, ¶134 (Judgment of Mar. 31).

To the extent the dissent suggests that the ICJ's decisions could be read to prevent application of procedural default rules where a defendant's attorney is unaware of Article 36, see *post*, at 24–25 (opinion of BREYER, J.), this interpretation of the Convention is in sharp conflict with the role of counsel in our system. "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" *Coleman* v. *Thompson*, 501 U. S. 722, 753 (1991) (quoting *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986)). Under our system, an attorney's lack of knowledge does not excuse the defendant's default, unless the attorney's overall representation falls below what is required by the Sixth Amendment. In any event, Bustillo himself does not argue that the applicability of procedural default rules hinges on whether a foreign national's attorney was aware of Article 36. See Brief for Petitioner in No. 05–51, p. 38 ("[A] lawyer may not, consistent with the purposes of Article 36, unilaterally forfeit a foreign national's opportunity to communicate with his consulate"). In fact, Bustillo has conceded that his "attorney at trial was aware of his client's rights under the Vienna Convention." App. in No. 05–51, p. 203, n. 5.

Much as Sanchez-Llamas cannot show that suppression is an appropriate remedy for Article 36 violations under domestic law principles, so too Bustillo cannot show that normally applicable procedural default rules should be suspended in light of the type of right he claims. In this regard, a comparison of Article 36 and a suspect's rights under *Miranda* disposes of Bustillo's claim. Bustillo contends that applying procedural default rules to Article 36 rights denies such rights "full effect" because the violation itself—*i.e.*, the failure to inform defendants of their right to consular notification—prevents them from becoming aware of their Article 36 rights and asserting them at trial. Of course, precisely the same thing is true of rights under *Miranda*. Police are required to advise suspects that they have a right to remain silent and a right to an attorney. See *Miranda*, 384 U. S., at 479; see also *Dickerson*, 530 U. S., at 435. If police do not give such warnings, and counsel fails to object, it is equally true that a suspect may not be "aware he even *had* such rights until well after his trial had concluded." Brief for Petitioner in No. 05–51, p. 35. Nevertheless, it is well established that where a defendant fails to raise a *Miranda* claim at trial, procedural default rules may bar him from raising the claim in a subsequent postconviction proceeding. *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977).

Bustillo responds that an Article 36 claim more closely resembles a claim, under *Brady* v. *Maryland*, 373 U. S. 83 (1963), that the prosecution failed to disclose exculpatory evidence—a type of claim that often can be asserted for the first time only in postconviction proceedings. See *United States* v. *Dominguez Benitez*, 542 U. S. 74, 83, n. 9 (2004). The analogy is inapt. In the case of a *Brady* claim, it is impossible for the defendant to know as a *factual* matter that a violation has occurred before the exculpatory evidence is disclosed. By contrast, a defendant is well aware of the fact that he was not informed of his Article 36

rights, even if the *legal* significance of that fact eludes him.

Finally, relying on *Massaro* v. *United States*, 538 U. S. 500, Bustillo argues that Article 36 claims "are most appropriately raised post-trial or on collateral review." Brief for Petitioner in No. 05–51, p. 39. *Massaro* held that claims of ineffective assistance of counsel may be raised for the first time in a proceeding under 28 U. S. C. §2255. That decision, however, involved the question of the proper forum for *federal* habeas claims. Bustillo, by contrast, asks us to require the *States* to hear Vienna Convention claims raised for the first time in *state* postconviction proceedings. Given that the Convention itself imposes no such requirement, we do not perceive any grounds for us to revise state procedural rules in this fashion. See *Dickerson*, *supra*, at 438.

We therefore conclude, as we did in *Breard*, that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims.

* * *

Although these cases involve the delicate question of the application of an international treaty, the issues in many ways turn on established principles of domestic law. Our holding in no way disparages the importance of the Vienna Convention. The relief petitioners request is, by any measure, extraordinary. Sanchez-Llamas seeks a suppression remedy for an asserted right with little if any connection to the gathering of evidence; Bustillo requests an exception to procedural rules that is accorded to almost no other right, including many of our most fundamental constitutional protections. It is no slight to the Convention to deny petitioners' claims under the same principles we would apply to an Act of Congress, or to the Constitution itself.

The judgments of the Supreme Court of Oregon and the Supreme Court of Virginia are affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 04–10566 and 05–51

MOISES SANCHEZ-LLAMAS, PETITIONER
04–10566 *v.*
OREGON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

MARIO A. BUSTILLO, PETITIONER
05–51 *v.*
GENE M. JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

[June 28, 2006]

JUSTICE GINSBURG, concurring in the judgment.

I agree that Article 36 of the Vienna Convention grants rights that may be invoked by an individual in a judicial proceeding, and therefore join Part II of JUSTICE BREYER's dissenting opinion. As to the suppression and procedural default issues, I join the Court's judgment. The dissenting opinion veers away from the two cases here for review, imagining other situations unlike those at hand. In neither of the cases before us would I remand for further proceedings.

I turn first to the question whether a violation of Article 36 requires suppression of statements to police officers in Sanchez-Llamas' case and others like it. Shortly after his arrest and in advance of any police interrogation, Sanchez-Llamas received the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), in both English and Spanish. Tr. 122 (Nov. 16, 2000). He indicated that he understood

those warnings, *id.*, at 123, telling the police that he had lived in the United States for approximately 11 years, *id.*, at 124, 143, 177. After a break in questioning, Sanchez-Llamas again received *Miranda* warnings in Spanish, and again indicated that he understood them. *Id.*, at 129, 176. Sanchez-Llamas, with his life experience in the United States, scarcely resembles the uncomprehending detainee imagined by JUSTICE BREYER, *post*, at 30. Such a detainee would have little need to invoke the Vienna Convention, for *Miranda* warnings a defendant is unable to comprehend give the police no green light for interrogation. *Moran* v. *Burbine*, 475 U. S. 412, 421 (1986) (a defendant's waiver of *Miranda* rights must be voluntary, knowing, and intelligent, *i.e.*, "the product of a free and deliberate choice . . . made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it"); *United States* v. *Garibay*, 143 F. 3d 534, 537–540 (CA9 1998) (defendant, who had difficulty understanding English, did not knowingly and intelligently waive his *Miranda* rights where the police recited the *Miranda* warnings only in English); *United States* v. *Short*, 790 F. 2d 464, 469 (CA6 1986) (defendant's limited comprehension of English cast substantial doubt on the validity of her *Miranda* waiver).[1]

In contrast to *Miranda* warnings, which must be given on the spot before the police interrogate, Article 36 of the Vienna Convention does not require the arresting authority to contact the consular post instantly. See *Case Concerning Avena and other Mexican Nationals (Mex.* v.

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[1]Before trial, Sanchez-Llamas moved to suppress his statements to police on voluntariness grounds. The trial court denied the motion, finding that clear and convincing evidence established Sanchez-Llamas' knowing, voluntary, and intelligent waiver of his *Miranda* rights. Tr. 232 (Nov. 16, 2000); App. to Pet. for Cert. in No. 04–10566, pp. 10–11. Neither the Oregon Court of Appeals nor the Oregon Supreme Court addressed Sanchez-Llamas' voluntariness challenge, and this Court declined to review the question.

U. S.), 2004 I. C. J. No. 128, ¶97 (Judgment of Mar. 31) *(Avena)* (United States's notification of Mexican consulate within three working days of detainee's arrest satisfied Article 36(1)(b)'s "without delay" requirement); U. S. Dept. of State, Consular Notification and Access 20, http://travel.state.gov/pdf/CNA_book.pdf (as visited June 26, 2006, and available in Clerk of Court's case file) (directing federal, state, and local law enforcement officials to notify the appropriate consular post "within 24 hours, and certainly within 72 hours" of a foreign national's request that such notification be made). Nor does that Article demand that questioning await notice to, and a response from, consular officials.[2] It is unsurprising, therefore, that the well researched dissenting opinion has not found even a single case in which any court, any place has *in fact* found suppression an appropriate remedy based on no provision of domestic law, but solely on an arresting officer's failure to comply with Article 36 of the Vienna Convention. See *post*, at 32; *ante*, at 9, n. 3.

The Court points out, and I agree, that in fitting circumstances, a defendant might successfully "raise an Article 36 claim as part of a broader challenge to the voluntariness of [a detainee's] statements to police." *Ante*, at 15. In that way, "full effect" could be given to Article 36 in a

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[2]See Declaration of Ambassador Maura A. Harty, Annex 4 to Counter-Memorial of the United States in *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128, pp. A385–A386, ¶¶34–38 (Oct. 25, 2003) (observing that some Convention signatories do not permit consular access until after the detainee has been questioned, and that, even in countries that permit immediate consular access, access often does not occur until after interrogation); cf. *Avena*, 2004 I. C. J., ¶87 (recognizing that Article 36(1)(b)'s requirement that authorities " 'inform the person concerned without delay of his rights' cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36").

manner consistent with U. S. rules and regulations. But the question presented here is whether suppression is warranted simply because the State's authorities failed to comply with Article 36 of the Vienna Convention. Neither the Convention itself nor the practice of our treaty partners establishes Sanchez-Llamas' entitlement to such a remedy. See *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. 155, 175–176 (1999) (construing the Warsaw Convention in accord with the views of the United States's treaty partners).

As to the procedural default issue, I note first two anomalies. The Court explains, and I agree, that it would be extraordinary to hold that defendants, unaware of their *Miranda* rights because the police failed to convey the required warnings, would be subject to a State's procedural default rules, but defendants not told of Article 36 rights would face no such hindrance. See *ante*, at 24. Furthermore, as the dissent apparently recognizes, in the federal court system, a later-in-time statute, codifying a federal procedural default rule, would "supersed[e] any inconsistent provision in the Convention." *Post*, at 25–26 (citing *Breard* v. *Greene*, 523 U. S. 371 (1998) *(per curiam)*). In my view, it would be unseemly, to say the least, for this Court to command state courts to relax their identical, or even less stringent procedural default rules, while federal courts operate without constraint in this regard. *Post*, at 26. That state of affairs, surely productive of friction in our federal system, should be resisted if there is a plausible choice, *i.e.*, if a reasonable interpretation of the federal statute and international accord would avoid the conflict.

Critical for me, Bustillo has conceded that his "attorney at trial was aware of his client's rights under the Vienna Convention." App. in No. 05–51, p. 203, n. 5. Given the knowledge of the Vienna Convention that Bustillo's lawyer possessed, this case fails to meet the dissent's (and the International Court of Justice's) first condition for overrid-

ing a State's ordinary procedural default rules: "[T]he [Vienna] Convention forbids American States to apply a procedural default rule to bar assertion of a Convention violation claim 'where it has been the failure of the United States [or of a State] itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial.'" *Post*, at 18 (emphasis deleted) (quoting *Avena*, 2004 I. C. J., ¶113); accord *post*, at 6, 16, 18, 23. Nothing the State did or omitted to do here "precluded counsel from . . . rais[ing] the question of a violation of the Vienna Convention in the initial trial." *Ibid.* Had counsel done so, the trial court could have made "appropriate accommodations to ensure that the defendant secure[d], to the extent possible, the benefits of consular assistance." *Ante*, at 15.[3]

In short, if there are some times when a Convention violation, standing alone, might warrant suppression, or the displacement of a State's ordinarily applicable procedural default rules, neither Sanchez-Llamas' case nor Bustillo's belongs in that category.

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[3]Furthermore, once Bustillo became aware of his Vienna Convention rights, nothing prevented him from raising an ineffective-assistance-of-counsel claim predicated on his trial counsel's failure to assert the State's violation of those rights. Through such a claim, as the dissent acknowledges, see *post*, at 16, 19, 25, 29, "full effect" could have been given to Article 36, without dishonoring state procedural rules that are compatible with due process. Bustillo did not include a Vienna-Convention-based, ineffective-assistance-of-counsel claim along with his direct Vienna Convention claim in his initial habeas petition. He later sought to amend his petition to add an ineffective-assistance-of-counsel claim, but the court held that the amendment did not relate back to the initial pleading. Tr. of Oral Arg. 26, 42. The state court therefore rejected Bustillo's ineffectiveness claim as barred by the applicable state statute of limitations. App. 132. Bustillo did not seek review of that decision in this Court.

* * *

For the reasons stated, I would not disturb the judgments of the Supreme Court of Oregon and the Supreme Court of Virginia.

SUPREME COURT OF THE UNITED STATES

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[June 28, 2006]

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE SOUTER join, and with whom JUSTICE GINSBURG joins as to Part II, dissenting.

The Vienna Convention on Consular Relations provides that when the police of a signatory nation arrest a foreign national, the detaining "authorities shall inform" the foreign national "without delay" of his "righ[t]" to communicate with his nation's consular officers. Vienna Convention on Consular Relations (Vienna Convention or Convention), Arts. 36(1)(a), (b), Apr. 24, 1963, [1970] 21 U. S. T. 77, 100–101, T. I. A. S. No. 6820. We granted certiorari in these cases to consider three related questions: (1) May a criminal defendant raise a claim (at trial or in a postconviction proceeding) that state officials violated this provision? (2) May a State apply its usual procedural default rules to Convention claims, thereby denying the defendant the right to raise the claim in a postconviction proceeding

on the ground that the defendant failed to raise the claim at trial? And (3) is suppression of a defendant's confession (made to police after a violation of the Convention) an appropriate remedy?

The Court assumes, but does not decide, that the answer to the first question is "yes." *Ante,* at 7–8. It answers the second question by holding that a State always may apply its ordinary procedural default rules to a defendant's claim of a Convention violation. *Ante,* at 15–25. Its answer to the third question is that suppression is never an appropriate remedy for a Convention violation. *Ante,* at 8–15.

Unlike the majority, I would decide the first question and answer it affirmatively. A criminal defendant may, at trial or in a postconviction proceeding, raise the claim that state authorities violated the Convention in his case. My answer to the second question is that *sometimes* state procedural default rules must yield to the Convention's insistence that domestic laws "enable full effect to be given to the purposes for which" Article 36's "rights . . . are intended." Art. 36(2), 21 U. S. T., at 101. And my answer to the third question is that suppression may *sometimes* provide an appropriate remedy. After answering these questions, I would remand these cases, thereby permitting the States to apply their own procedural and remedial laws, but with the understanding that the Federal Constitution requires that the application of those laws be consistent with the Convention's demand for an effective remedy for an Article 36 violation. See U. S. Const., Art. VI, cl. 2 ("[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby").

I

A

The Vienna Convention is an international treaty that

governs relations between individual nations and foreign consular officials. The United States and 169 other nations have ratified the Convention. Its adoption in 1963 was perhaps "the single most important event in the entire history of the consular institution." L. Lee, Consular Law and Practice 26 (2d ed. 1991). The Convention defines consular functions to include "protecting in the receiving State the interests of the sending State and of its nationals," and "helping and assisting nationals . . . of the sending State." Arts. 5(a), (e), 21 U. S. T., at 82–83. The United States ratified the Convention in 1969.

Article 36 of the Convention governs relations between a consulate and its nationals, particularly those who have been arrested by the host country. Its object is to assure consular communication and assistance to such nationals, who may not fully understand the host country's legal regime or even speak its language. Article 36 reads as follows:

> "1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> "(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> "(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without de-*

lay of his rights under this sub-paragraph;

. . . . .

"2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." 21 U. S. T., at 100–101 (emphasis added).

The U. S. State Department's Foreign Affairs Manual has long stressed the importance the United States places upon these provisions. It says, "[O]ne of the basic functions of a consular office has been to provide a 'cultural bridge' between the host community and the [U. S. national]. No one needs that cultural bridge more than the individual U. S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail." 7 Foreign Affairs Manual §401 (1984); see also *id.*, §§401–426 (2004).

B

In 1969, the United States also ratified (but the President has since withdrawn from) an Optional Protocol to the Convention. See Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), Apr. 24, 1963, [1970] 21 U. S. T. 325, T. I. A. S. No. 6820; Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005) (giving notice of United States' withdrawal from the Optional Protocol). The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice [ICJ]." 21 U. S. T., at 326.

Acting pursuant to the Optional Protocol, Germany (in 1999) and Mexico (in 2003) brought proceedings before the ICJ, seeking redress for what they said were violations of

Article 36 by the United States. *LaGrand Case (F. R. G. v. U. S.)*, 2001 I. C. J. 466 (Judgment of June 27) *(LaGrand)* (case brought by Germany); *Case Concerning Avena and other Mexican Nationals (Mex. v. U. S.)*, 2004 I. C. J. No. 128 (Judgment of Mar. 31) *(Avena)* (case brought by Mexico).

In Germany's case, the ICJ rejected the United States' claim that the "rights of consular notification and access under [Article 36] are rights of States, and not of individuals." *LaGrand*, 2001 I. C. J., at 19–20, ¶76. It held instead that (1) if an arrested foreign national is prejudiced by the host country's failure to inform him of his Article 36 rights, and (2) if that individual has "been subjected to prolonged detention or convicted and sentenced to severe penalties," then a diplomatic apology alone is not a sufficient remedy. *Id.*, at 32–33, ¶125. Rather, the Convention requires the host country, in that case the United States, "to allow the review and reconsideration of the" foreign national's "conviction and sentence by taking account of the violation of the rights set forth in the Convention." *Ibid.* The ICJ added that "[t]he choice of means" for providing this review "must be left to the United States." *Ibid.* In addition, the ICJ stated that in the case before it, application of a procedural default rule (that is, the rule that the LaGrands could not bring their Convention claims in habeas proceedings because they had not raised those claims at trial) violated Article 36(2) of the Convention because it "had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended.'" *Id.*, at 22, ¶91 (quoting Art. 36(2), 21 U. S. T., at 101). In the ICJ's view, it was "the failure of the American authorities to comply" with Article 36 that prevented the LaGrands from raising their claims earlier. *LaGrand, supra*, at 22, ¶91.

In Mexico's case, the ICJ reiterated its view that Article 36, in addition to imposing obligations on member nations,

also allows foreign nationals to bring claims based on those violations in domestic judicial proceedings. The ICJ noted that, as a matter of international law, breach of a treaty ordinarily " 'involves an obligation to make reparation in an adequate form.' " *Avena, supra,* ¶119 (quoting *Factory at Chorzów, Jurisdiction,* 1927, P. C. I. J., ser. A, No. 9, p. 21). Applying that principle to the Convention, the ICJ concluded that "the remedy to make good . . . violations [of Article 36] should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts . . . with a view to ascertaining whether in each case the violation . . . *caused actual prejudice* to the defendant in the process of administration of criminal justice." *Avena,* 2004 I. C. J., ¶121 (emphasis added). The court added that this "review and reconsideration," to be "effective," must "fully examin[e] and tak[e] into account" any such prejudice to the defendant. *Id.,* ¶138. The ICJ declined to specify the means by which American courts should provide such "review and reconsideration." Instead, the ICJ said, the appropriate remedy depends upon an examination of "the concrete circumstances of each case" and should be determined "by the United States courts concerned in the process of their review and reconsideration." *Id.,* ¶127.

In respect to procedural default, the ICJ referenced what it said in *LaGrand,* while adding the critically important qualification that the cases in which the Convention blocked application of a procedural default rule were those in which it was "the failure of the United States itself to inform" an arrested foreign national of his right to contact the consulate that "precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial." *Avena, supra,* ¶113.

C

For present purposes, the key sections of the Convention are (1) the provision that requires the United States to "inform" an arrested person "without delay" of his Article 36 rights, including the right to "communicat[e]" with his "consular post," and (2) the provision that says domestic laws and regulations "must enable full effect to be given" to the purposes underlying those requirements.

The key ICJ holdings are its determinations (1) that the Convention obligates a member nation to inform an arrested foreign national without delay that he may contact his consulate; (2) that the Convention requires the United States to provide some process for its courts to "review and reconside[r]" criminal convictions where there has been a prejudicial violation of this obligation; and (3) that this "review and reconsideration" cannot be foreclosed on the ground that the foreign national did not raise the violation at trial *where the authorities' failure to inform the foreign national of his rights prevented him from timely raising his claim.*

II

The first question presented is whether a criminal defendant may raise a claim (at trial or in a postconviction proceeding) that state officials violated Article 36 of the Convention. The Court assumes that the answer to this question is "yes," but it does not decide the matter because it concludes in any event that the petitioners are not entitled to the remedies they seek. As explained below, I would resolve those remedial questions differently. Hence, I must decide, rather than assume, the answer to the first question presented.

Regardless, the first question raises an important issue of federal law that has arisen hundreds of times in the lower federal and state courts. See generally Wooster, Construction and Application of Vienna Convention on

Consular Relations (VCCR), Requiring That Foreign Consulate Be Notified When One of Its Nationals Is Arrested, 175 A. L. R. Fed. 243 (2002) (collecting federal cases). Those courts have divided as to the proper answer. Compare *Cardenas* v. *Dretke*, 405 F. 3d 244 (CA5 2005) (defendant cannot bring Convention claim in judicial proceeding); *United States* v. *Emuegbunam*, 268 F. 3d 377 (CA6 2001) (same); *State* v. *Martinez-Rodriguez*, 2001–NMSC–029, 33 P. 3d 267 (2001) (same); 338 Ore. 267, 108 P. 3d 573 (2005) (same); *Shackleford* v. *Commonwealth*, 262 Va. 196, 547 S. E. 2d 899 (2001) (same), with *Jogi* v. *Voges*, 425 F. 3d 367 (CA7 2005) (defendant can bring Convention claim in judicial proceeding). And the issue often arises in a legal context where statutes or procedural requirements arguably block this Court's speedy review. See *Medellín* v. *Dretke*, 544 U. S. 660 (2005) *(per curiam)*. We granted the petitions for certiorari in significant part in order to decide this question. And, given its importance, we should do so.

In answering the question it is common ground that the Convention is "self-executi[ng]." See S. Exec. Rep. No. 91–9, p. 5 (1969); see also Brief for Respondent in No. 04–10566, pp. 9–10; Brief for Respondent in No. 05–51, p. 23. That is to say, the Convention "operates of itself without the aid of any legislative provision." *Foster* v. *Neilson*, 2 Pet. 253, 314 (1829). The parties also agree that we need not decide whether the Convention creates a "private right of action," *i.e.*, a private right that would allow an individual to bring a lawsuit for enforcement of the Convention or for damages based on its violation. Rather, the question here is whether the Convention provides, in these cases, law applicable in legal proceedings that might have been brought irrespective of the Vienna Convention claim, here an ordinary criminal appeal and an ordinary postconviction proceeding.

Bustillo, for example, has brought an action under a Virginia statute that allows any convicted person to seek

release from custody on the ground that "he is detained without lawful authority." Va. Code Ann. §8.01–654(A)(1) (Lexis 2005). Sanchez-Llamas has challenged his state criminal conviction on direct appeal, and in that proceeding he is entitled to claim that his conviction violates state or federal law. In both cases the petitioners argue that a court decision favoring the prosecution would violate the Convention (as properly interpreted), and therefore the Constitution forbids any such decision. See U. S. Const., Art. VI, cl. 2. This argument in effect claims that the Convention itself provides applicable law that here would favor the petitioners if, but only if, they are correct as to their interpretation of the Convention (which is, of course, a different matter).

The petitioners must be right in respect to their claim that the Convention provides law that here courts could apply in their respective proceedings. The Convention is a treaty. And "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U. S. Const., Art. VI, cl. 2. As Chief Justice Marshall long ago explained, under the Supremacy Clause a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." *Foster, supra,* at 314.

Directly to the point, this Court stated long ago that a treaty "is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice," in such a case the court is to "resor[t] to the treaty for a rule of decision for the case before it as it would to a statute." *Head Money Cases,* 112 U. S. 580, 598–599 (1884).

As noted above, see *supra,* at 8, the parties agree that the Convention "operates of itself without the aid of any

legislative provision." *Foster, supra,* at 314. The question, then, is the one this Court set forth in the *Head Money Cases:* Does the Convention set forth a "law" with the legal stature of an Act of Congress? And as the Court explained, we are to answer that question by asking, does the Convention "prescribe a rule by which the rights of the private citizen . . . may be determined"? Are the obligations set forth in Article 36(1)(b) "of a nature to be enforced in a court of justice"?

The "nature" of the Convention provisions raised by the petitioners indicates that they are intended to set forth standards that are judicially enforceable. Those provisions consist of the rights of a foreign national "arrested" or "detained in any other manner" (1) to have, on his "reques[t]," the "consular post" "inform[ed]" of that arrest or detention; (2) to have forwarded "without delay" any "communication addressed to the consular post"; and (3) to be "inform[ed] . . . without delay" of those two "rights." Art. 36(1)(b), 21 U. S. T., at 101. These rights do not differ in their "nature" from other procedural rights that courts commonly enforce. Cf. U. S. Const., Amdt. 6 ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation"); *ibid.* ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"); *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

Moreover, the language of Article 36 speaks directly of the "rights" of the individual foreign national. See Art. 36(1)(b), 21 U. S. T., at 101 ("The said authorities shall inform the person concerned without delay of *his rights* under this sub-paragraph" (emphasis added)). Article 36 thus stands in stark contrast to other provisions of the Convention, which speak in terms of the rights of the member nations or consular officials. Cf. Art. 9, *id.,* at 86 (discussing "the *right of* any of the *Contracting Parties* to fix the designation of consular officers" (emphasis added));

Art. 34, *id.*, at 98 (consular officials shall have "freedom of movement and travel"); Art. 35, *id.*, at 99 (consular officials shall have "freedom of communication"); Art. 41(1), *id.*, at 103 ("Consular officers shall not be liable to arrest or detention pending trial").

Suppose that a pre-*Miranda* federal statute had said that arresting authorities "shall inform a detained person without delay of his right to counsel." Would courts not have automatically assumed that this statute created applicable law that a criminal defendant could invoke at trial? What more would the statute have to say? See *Medellín*, 544 U. S., at 687 (O'Connor, J., dissenting) ("And if a statute were to provide, for example, that arresting authorities 'shall inform a detained person without delay of his right to counsel,' " what "more would be required" to permit "a defendant" to "invoke that statute"?).

Further, this Court has routinely permitted individuals to enforce treaty provisions similar to Article 36 in domestic judicial proceedings. In *United States* v. *Rauscher*, 119 U. S. 407, 410–411 (1886), for example, this Court concluded that the defendant could raise as a defense in his federal criminal trial the violation of an extradition treaty that said, "'It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them . . . deliver up to justice all persons'" charged with certain crimes in the other country. Similarly, in *Kolovrat* v. *Oregon*, 366 U. S. 187, 191, n. 6 (1961), the Court held that foreign nationals could challenge a state law limiting their right to recover an inheritance based on a treaty providing that "'[i]n all that concerns the right of acquiring, possessing or disposing of every kind of property . . . citizens of [each country who reside in the other] shall enjoy the rights which the respective laws grant . . . in each of these states to the subjects of the most favored nation.'" And in *Asakura* v. *Seattle*, 265 U. S. 332, 340 (1924), the Court allowed a foreign national to challenge a city ordinance

forbidding noncitizens from working as pawnbrokers under a treaty stating that "'citizens or subjects of each of the High Contracting Parties shall have liberty . . . to carry on trade'" and "'generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects.'"

In all these cases, the Court recognized that (1) a treaty obligated the United States to treat foreign nationals in a certain manner; (2) the obligation had been breached by the Government's conduct; and (3) the foreign national could therefore seek redress for that breach in a judicial proceeding, even though the treaty did not specifically mention judicial enforcement of its guarantees or even expressly state that its provisions were intended to confer rights on the foreign national. Language and context argue yet more strongly here in favor of permitting a criminal defendant in an appropriate case to find in the Convention a law to apply in the proceeding against him.

In addition, the Government concedes that individual consular officials may enforce *other* provisions of the Convention in American courts. For example, Article 43(1) grants consular officials immunity from "the jurisdiction of the" host country's "judicial or administrative authorities" for "acts performed in the exercise of consular functions." 21 U. S. T., at 104. The federal courts have held that a consular official may raise Article 43(1) in a judicial proceeding, even though that provision does not expressly mention a judicial remedy. See, *e.g.*, *Risk* v. *Halvorsen*, 936 F. 2d 393, 397 (CA9 1991); *Gerritsen* v. *de la Madrid Hurtado*, 819 F. 2d 1511, 1515–1516 (CA9 1987); see also Brief for United States as *Amicus Curiae* 14, n. 2 (citing with approval these cases). What in Article 36 warrants treating it differently in this respect?

Finally, the international tribunal that the United States agreed would resolve disputes about the interpretation of the Convention, the ICJ, has twice ruled that an

arrested foreign national may raise a violation of the arresting authorities' obligation to "inform [him] without delay of his rights under" Article 36(1) in an American judicial proceeding. See *Avena*, 2004 I. C. J. No. 128; *LaGrand*, 2001 I. C. J. 466. That conclusion, as an "interpretation of an international agreement by an international court" deserves our "'respectful consideration.'" *Ante*, at 21. That "respectful consideration," for reasons I shall explain, see *infra*, at 18–21, counsels in favor of an interpretation that is consistent with the ICJ's reading of the Convention here.

The Government says to the contrary that Article 36 is "addressed solely to the rights of States and not private individuals"; hence, a foreign national may not claim in an American court that a State has convicted him without the consular notification that Article 36 requires. Brief for United States as *Amicus Curiae* 7. But its arguments are not persuasive. The Government rests this conclusion primarily upon its claim that there is a "long-established presumption that treaties and other international agreements do not create judicially enforceable individual rights." *Id.*, at 11.

The problem with that argument is that no such presumption exists. The Government cites three cases in support of its position, *Charlton* v. *Kelly*, 229 U. S. 447, 474 (1913); *Whitney* v. *Robertson*, 124 U. S. 190, 195 (1888); and *Foster*, 2 Pet., at 306–307. The first of these, *Charlton*, says that the question whether a treaty has been abrogated by another nation's violations is a matter with which "'judicial tribunals have nothing to do.'" 229 U. S., at 474. The second, *Whitney*, says that whether a subsequent federal statute that abrogates a treaty violates the United States' treaty obligations is a matter that has "not been confided to the judiciary." 124 U. S., at 195. The third, *Foster*, says that in "a controversy between two nations concerning national boundary, it is scarcely possi-

ble that the courts of either should refuse to abide by the measures adopted by its own government." 2 Pet., at 307. What have these issues to do with the present one? How do these cases support the presumption that the Government claims?

Regardless, as I have just said, see *supra*, at 9, the *Head Money Cases* make clear that a treaty may confer certain enforceable "rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other." 112 U. S., at 598; see also 2 Restatement (Third) on Foreign Relations Law of the United States §907 (1986) (hereinafter Restatement) ("A private person having rights against the United States under an international agreement may assert those rights in courts in the United States"). And the language of the Convention makes clear that it is such a treaty. Indeed, to my knowledge no other nation's courts (or perhaps no more than one) have held to the contrary. The cases cited by the respondents and the Government do not say otherwise. See Judgment of Nov. 7, 2001, 5 BGHSt 116 (Germany) (deciding in light of *LaGrand* that the Convention creates individual rights, but declining to suppress confession); *Queen* v. *Abbrederis* (1981) 51 F. L. R. 99, 115 (Ct. Crim. App. New South Wales (Australia)) (deciding that Convention does not "affect the carrying out of an investigation by interrogation of a foreign person coming to this country"). But see *Queen* v. *Van Bergen* [2000] 261 A. R. 387, 390 (Ct. App. Alberta (Canada)) (noting *in dictum* that the Convention "creates an obligation between states and is not one owed to the national," but affirming denial of suppression motion on the ground that "there was in any event no proven prejudice to" the defendant). See also *Queen* v. *Partak*, [2001] 160 C. C. C. 3d 553 (Ont. Super. Ct. of J.) (applying *Van Bergen*'s "serious prejudice" test to conclude that defendant's statements were admissible); compare cases cited *infra*, at 31–32.

The Government also points out that the Executive Branch's interpretation of treaty provisions is entitled to "great weight." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 184–185 (1982). I agree with this presumption. But the Executive's views on our treaty obligations are "not conclusive." *Ibid.*; see *Perkins* v. *Elg*, 307 U. S. 325, 328, 337–342 (1939) (declining to adopt Executive's treaty interpretation); *Johnson* v. *Browne*, 205 U. S. 309, 319–321 (1907) (same); *De Lima* v. *Bidwell*, 182 U. S. 1, 181, 194–199 (1901) (same). Where language, the nature of the right, and the ICJ's interpretation of the treaty taken separately or together so strongly point to an intent to confer enforceable rights upon an individual, I cannot find in the simple fact of the Executive Branch's contrary view sufficient reason to adopt the Government's interpretation of the Convention.

Accordingly, I would allow the petitioners to raise their claims based on violations of the Convention in their respective state-court proceedings.

III

The more difficult issue, I believe, concerns the nature of the Convention's requirements as to remedy. In particular, Bustillo's case concerns a state procedural default rule. When, if ever, does the Convention require a state court to set aside such a rule in order to hear a criminal defendant's claim that the police did not "inform" him of his "right" to communicate with his "consular post"? Art. 36(1)(b), 21 U. S. T., at 101. The Court says that the answer is "never." See *ante*, at 15–25. In its view, the Convention does not under any circumstances trump a State's ordinary procedural rules requiring a defendant to assert his claims at trial or lose them forever.

In my view, Article 36 of the Convention requires a less absolute answer. Article 36 says that the rights it sets forth "shall be exercised in conformity with the laws and

regulations of the receiving State," but it instantly adds, "subject to the proviso . . . that the said laws and regulations must enable *full effect* to be given to the purposes for which the [Article 36] rights are . . . intended." Art. 36(2), 21 U. S. T., at 101 (emphasis added). The proviso means that a State's ordinary procedural default rules apply *unless* (1) the defendant's failure to raise a Convention matter (*e.g.*, that police failed to inform him of his Article 36 rights) can itself be traced to the failure of the police (or other governmental authorities) to inform the defendant of those Convention rights, *and* (2) state law does not provide any other effective way for the defendant to raise that issue (say, through a claim of ineffective assistance of counsel).

Several considerations lead to this conclusion. First, as I have just noted, Article 36 says both that its rights "shall be exercised in conformity with" the host country's "laws and regulations" and that those "laws and regulations must enable full effect to be given" to the purposes for which those rights "are intended." This interpretation makes *both* the "conformity" requirement and the "full effect" requirement meaningful.

Second, the Convention's drafting history supports this interpretation. The first draft of the Vienna Convention was written by the International Law Commission. Article 36(2) of that draft required only that domestic laws "not nullify" the rights afforded by the Convention. Draft Articles on Consular Relations Adopted by the International Law Commission at its Thirteenth Session, Art. 36(2), reprinted in L. Lee, Vienna Convention on Consular Relations 237 (1966). A later amendment substituted the "full effect" phrase over the strenuous objection of several negotiating countries whose delegates argued that the phrase would "modify the criminal law and regulations or the criminal procedure of the receiving state." 1 United Nations Conference on Consular Relations, Official Re-

cords, Summary records of plenary meetings and of the meetings of the First and Second Committees, U. N. Doc. A/CONF.25/16, ¶26, p. 38 (1963) (statement of Romania). See also *id.*, at ¶30, p. 38–39 (statement of Congo, Leopoldville) (amendment "implied the revision of certain laws or regulations, which it would be difficult to carry out in practice"); *id.*, 12th mtg., ¶4, at 40 (statement of Union of Soviet Socialist Republics) (rejecting the amendment because it would "force [signatories] to alter their criminal laws and regulations"); *id.*, 20th mtg., ¶81, at 84 (statement of Romania) (same); *id.*, ¶95, at 86 (statement of Czechoslovakia) (same).

Based on this objection, the Soviet Union proposed reverting to the original language. The United Kingdom opposed that measure, explaining that it supported the "full effect" version because the initial ("not nullify") version

> "meant that the laws and regulations of the receiving State would govern the rights specified . . . provided that they did not render those rights completely inoperative—for 'to nullify' meant to 'render completely inoperative.' But rights could be seriously impaired without becoming completely inoperative. . . . Consular officials should, of course, comply with the laws and regulations of the receiving State in such matters as the times for visiting prisoners, but it was most important that the substance of the rights and obligations specified . . . should be preserved." *Id.*, ¶¶6–7, at 40.

No one disagreed with the United Kingdom's understanding of the words "full effect." And with that understanding, the delegates voted down the Soviet Union's proposal to revert to the original language, and ultimately adopted the provision with the words "full effect." *Id.*, ¶109, at 87. As so enacted, the provision reflects the "essential princi-

ple of international law . . . 'that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.' " 2 Restatement §901, at 343.

Third, the decisions of the ICJ, fairly read, interpret the Convention similarly. In *LaGrand* and *Avena*, the ICJ read the Convention as authorizing an individual foreign national to raise an Article 36 violation at trial or in a postconviction proceeding. See *Avena*, 2004 I. C. J., ¶121; *LaGrand*, 2001 I. C. J., at 32–33, ¶125. The ICJ added that the Convention requires member states to provide "effective" remedies in their courts for Convention violations. See *Avena*, *supra*, ¶138. And the ICJ made two critical statements in respect to procedural default rules. In *LaGrand*, the court said that in "itself, the [procedural default] rule does *not* violate Article 36 of the Vienna Convention." 2001 I. C. J., at 22, ¶90 (emphasis added). Rather, the "problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming . . . that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay.' " *Ibid.* And the ICJ later specified that the Convention forbids American States to apply a procedural default rule to bar assertion of a Convention violation claim "*where it has been the failure of the United States [or of a State] itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial.*" *Avena*, 2004 I. C. J., ¶113 (emphasis added).

This last statement indicates that the ICJ understood the Convention to prevent application of a procedural default rule only where the arresting authorities' failure to inform the foreign national of his Convention rights brought about the procedural default in the first place.

Taken together, the above statements make clear that the ICJ read the Convention simply to require an effective remedy. It stated repeatedly that it did not dictate what that remedy would be, as long it was offered as part of the "judicial process." *Id.*, ¶140–141. Hence, if the State provides *some other effective remedy*, for example, review for prejudice through a claim of ineffective assistance of counsel, then the Convention would not forbid application of ordinary procedural default rules. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.6 (Rev. ed. 2003) (discussing defense counsel's obligation to seek consular assistance); *Valdez* v. *Oklahoma*, 46 P. 3d 703, 710 (Okla. Crim. App. 2002) (granting postconviction relief to a defendant who had failed to raise a Vienna Convention violation at trial, because he showed that his lawyer "could have obtained financial, legal and investigative assistance from his consulate" that would have produced important new evidence); see also *Ledezma* v. *State*, 626 N. W. 2d 134, 152 (Iowa 2001) (concluding that "all criminal defense attorneys representing foreign nationals should be aware of the right to consular access as provided by Article 36, and should advise their clients of this right" because local counsel "are not equipped to provide the same services as the local consulate"); cf. *Rompilla* v. *Beard*, 545 U. S. 374 (2005).

I will assume that the ICJ's interpretation does not bind this Court in this case. Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T. S. No. 993 (1945) (ICJ decisions have "binding force" only "between the parties and in respect of that particular case"). But as the majority points out, the ICJ's decisions on this issue nonetheless warrant our "'respectful consideration.'" *Ante*, at 21. That "respectful consideration" reflects the understanding that uniformity is an important goal of treaty interpretation. See *Olympic Airways* v. *Husain*, 540 U. S. 644, 660

(2004) (SCALIA, J., dissenting) ("[I]t is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently"). And the ICJ's position as an international court specifically charged with the duty to interpret numerous international treaties (including the Convention) provides a natural point of reference for national courts seeking that uniformity. See Counter-Memorial of the United States in *Avena*, 2004 I. C. J. No. 128, p. 61, n. 128 (Nov. 3, 2003) (even if ICJ decision binds only in particular case, "it is well-settled" that an ICJ decision "may serve as authority beyond a particular case"; citing authorities); Ordonez & Reilly, Effect of the Jurisprudence of the International Court of Justice on National Courts, in International Law Decisions in National Courts 335, 365 (T. Franck & G. Fox eds. 1996) (noting that ICJ cases interpreting treaties "are routinely cited by domestic judges" in many countries "as evidence of international law").

That "respectful consideration" also reflects an understanding of the ICJ's expertise in matters of treaty interpretation, a branch of international law. The ICJ's opinions "are persuasive evidence" of what "[international] law is." 1 Restatement §103, comment *b*, at 37; see also Morrison, Treaties as a Source of Jurisdiction, Especially in U. S. Practice, in The International Court of Justice at a Crossroads 58, 61 (L. Damrosch ed. 1987); *The Paquete Habana*, 175 U. S. 677, 700 (1900) ("[T]rustworthy evidence of what [international] law really is" can be found in "the works of jurists and commentators, who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat"); L. Henkin, R. Pugh, O. Schachter, & H. Smit, International Law: Cases and Materials 120 (3d ed. 1993) ("[T]he decisions of the International Court of Justice are, on the whole, regarded by international lawyers as highly persuasive authority of existing international law").

Thus, this Court has repeatedly looked to the ICJ for guidance in interpreting treaties and in other matters of international law. See, *e.g.*, *United States* v. *Maine*, 475 U. S. 89, 99–100 (1986) (referring to the *Fisheries Case (United Kingdom* v. *Norway)*, 1951 I. C. J. 116, as legal authority in a maritime boundary dispute); *United States* v. *Louisiana*, 470 U. S. 93, 107 (1985) (same); *United States* v. *Louisiana*, 394 U. S. 11, 69–72 (1969) (same); *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611, 628, and n. 20 (1983) (citing *Case Concerning The Barcelona Traction, Light & Power Co.*, 1970 I. C. J. 3, for the proposition that an incorporated entity "is not to be regarded as legally separate from its owners in all circumstances"); *United States* v. *California*, 381 U. S. 139, 172 (1965) (citing the *Corfu Channel Case*, 1949 I. C. J. Rep. 4, in boundary dispute); *Reid* v. *Covert*, 354 U. S. 1, 61 (1957) (plurality opinion) (citing *France* v. *United States*, 1952 I. C. J. Rep. 176, as authority for the meaning of the word "'disputes'" in international treaties).

The lower courts have done the same. See, *e.g.*, *McKesson Corp.* v. *Islamic Republic of Iran*, 52 F. 3d 346, 352 (CADC 1995); *Princz* v. *Federal Rupublic of Germany*, 26 F. 3d 1166, 1180, 1184 (CADC 1994) (Wald, J., dissenting); *Siderman de Blake* v. *Republic of Argentina*, 965 F. 2d 699, 715 (CA9 1992); *Committee of United States Citizens Living in Nicaragua* v. *Reagan*, 859 F. 2d 929, 932, 935 (CADC 1988); *Arcoren* v. *Peters*, 811 F. 2d 392, 397, n. 11 (CA8 1987); *Conservation Law Foundation of New England* v. *Secretary of Interior*, 790 F. 2d 965, 967 (CA1 1986); *Persinger* v. *Islamic Republic of Iran*, 729 F. 2d 835, 837, 843 (CADC 1984); *McKeel* v. *Islamic Republic of Iran*, 722 F. 2d 582, 585 (CA9 1983); *Cruz* v. *Zapata Ocean Resources, Inc.*, 695 F. 2d 428, 433, and nn. 8–9 (CA9 1982); *Spiess* v. *C. Itoh & Co. (America)*, 643 F. 2d 353, 365 (CA5 1981) (Reavley, J., dissenting); *Agee* v. *Muskie*, 629 F. 2d 80, 90 (CADC 1980) (MacKinnon, J., dissenting);

Sadat v. *Mertes*, 615 F. 2d 1176, 1188, n. 14 (CA7 1980); *Narenji* v. *Civiletti*, 617 F. 2d 745, 748 (CADC 1979); *United States* v. *Postal*, 589 F. 2d 862, 869 (CA5 1979); *McComish* v. *Commissioner*, 580 F. 2d 1323, 1329 (CA9 1978); *Diggs* v. *Richardson*, 555 F. 2d 848, 849 (CADC 1976); *Island Airlines, Inc.* v. *CAB*, 352 F. 2d 735, 741 (CA9 1965); *Rogers* v. *Societe Internationale Pour Participations Industrielles et Commerciales, S. A.*, 278 F. 2d 268, 273, n. 3 (CADC 1960) (Fahy, J., dissenting); *Greenpeace, Inc.* v. *France*, 946 F. Supp. 773, 783 (CD Cal. 1996); *Looper* v. *Morgan*, Civ. No. H–92–0294, 1995 WL 499816, *1 (SD Tex., June 23, 1995); *Koru North America* v. *United States*, 701 F. Supp. 229, 232 (CIT 1988); *United States* v. *Central Corp. of Ill.*, No. 87 C 5072, 1987 WL 20129 (ND Ill. Nov. 13, 1987); *United States* v. *Palestine Liberation Organization*, 695 F. Supp. 1456, 1461–1462, 1467 (SDNY 1988); *Morgan Guaranty Trust Company of N. Y.* v. *Republic of Palau*, 639 F. Supp. 706, 715 (SDNY 1986); *Massachusetts* v. *Clark*, 594 F. Supp. 1373, 1387–1388, n. 8 (Mass. 1984); *United States-South West Africa/Namibia Trade & Cultural Council* v. *Department of State*, 90 F. R. D. 695, 696, n. 2 (DC 1981); *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1187 (ED Pa. 1980); *Rodriguez Fernandez* v. *Wilkinson*, 505 F. Supp. 787, 797 (Kan. 1980); *In re Alien Children Ed. Litigation*, 501 F. Supp. 544, 591 (SD Tex. 1980); *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, 493 F. Supp. 522, 525 (DC 1980); *National Airmotive* v. *Government and State of Iran*, 491 F. Supp. 555, 556 (DC 1980); *CAB* v. *Island Airlines, Inc.*, 235 F. Supp. 990, 1003–1004, and nn. 23–24, 1005, and n. 27 (Haw. 1964); *United States* v. *Melekh*, 190 F. Supp. 67, 81, 89 (SDNY 1960); *Balfour, Guthrie & Co.* v. *United States*, 90 F. Supp. 831, 834, n. 1 (ND Cal. 1950).

Today's decision interprets an international treaty in a manner that conflicts not only with the treaty's language

and history, but also with the ICJ's interpretation of the same treaty provision. In creating this last-mentioned conflict, as far as I can tell, the Court's decision is unprecedented.

The Court supports its interpretation in three basic ways. First, the majority says that "respectful consideration" does not require us to agree with a decision that is clearly wrong. And, it says, the ICJ's decision is clearly wrong. The ICJ's interpretation of Article 36, the majority says, would permit a Convention violation claim to "trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication." *Ante*, at 22. That interpretation, it adds, "overlooks the importance of procedural default rules in an adversary system," and is "inconsistent with the basic framework" of that "system." *Ante*, at 21–22.

The majority's argument, however, overlooks what the ICJ actually said, overstates what it actually meant, and is inconsistent with what it actually did. In *Avena* and *LaGrand*, the ICJ did not say that the Convention necessarily trumps any, let alone all, procedural rules that would otherwise bar assertion of a Convention violation claim. Nor did it say that the Convention necessarily trumps all procedural default rules. Rather, it said that the Convention prohibits application of those rules to a Convention violation claim only "where it has been the *failure* of the United States [or of a State] itself *to inform* that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial." *Avena*, 2004 I. C. J., ¶113 (emphasis added). Thus, Article 36(2) precludes procedural default only *where the defendant's failure to bring his claim sooner is the result of the underlying violation.* Since procedural default rules themselves typically excuse defaults where a defendant shows "cause and prejudice," it

is difficult to see how this statement "overlooks the importance of procedural default rules in an adversary system," or is "inconsistent with the basic framework" of that "system."

Moreover, *Avena* and *LaGrand* make clear what the ICJ's language taken in context means: The Convention requires effective national remedies; hence local procedural rules must give way (to the Convention's "full effect" requirement) when, but only when, it is the failure of the arresting authorities to inform the defendant of his Convention rights that prevented the defendant from bringing his claim sooner. The opinions nowhere suggest that a State must provide a procedural remedy to a defendant who, for example, sleeps on his rights.

Consider, too, what the ICJ did in *Avena*, a case that clarified the court's earlier *LaGrand* opinion. It did not hold that American courts must ignore their procedural default rules in each of the 54 individual cases at issue. Rather, it held that domestic courts must provide "review and reconsideration" in each case. *Avena*, 2004 I. C. J., ¶153(9). It nowhere forbids a state court conducting such a "review" to bar claims not timely made provided that the violation did not itself cause the delay. See *id.*, ¶139.

Perhaps the ICJ's opinions are open to different interpretations. But how does reading those opinions as creating an extreme rule of law, as reflecting a lack of understanding of the "adversary system," show "respectful consideration"? To show that kind of respect, we must read the opinions in light of the Convention's underlying language and purposes and ask whether, or to what extent, they require modification of a State's ordinary procedural rules. See Art. 36(2), 21 U. S. T., at 101 (laws and regulations "must enable full effect to be given *to the purposes* for which the rights accorded under this Article are intended" (emphasis added)).

Nothing in *Avena* suggests, for example, that an ar-

rested foreign national who was already aware of his rights under Article 36, or who had a lawyer who was aware of those rights, necessarily would be entitled to an exemption from the State's procedural default rules under Article 36(2). Instead, as I have explained, see *supra*, at 18–19, 23, *Avena* says only that Article 36(2) requires a state court to excuse a procedural default rule where the State failed to inform the defendant of his consular access rights, *and* the defendant was not aware of those rights, *and* the State is unwilling to provide some other effective remedy, for example (if the lawyer acts incompetently in respect to Convention rights of which the lawyer was aware) an ineffective-assistance-of-counsel claim. The Court's reluctance to give *LaGrand* and *Avena* this perfectly reasonable interpretation reflects a failure to provide in practice the "respectful consideration" that we all believe the law demands.

The Court also relies on *Breard* v. *Greene*, 523 U. S. 371 (1998) *(per curiam)*. In that case a foreign national, claiming a Convention violation, sought federal habeas corpus. This Court upheld a denial of relief on the ground that the lower courts had correctly found that Breard procedurally defaulted his Convention violation claim by failing to timely raise it in his state-court proceedings. In reaching its conclusion, the Court rejected Breard's claim that the Convention trumped the procedural default rule. Its reasons were (1) that "it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State," *id.*, at 375; (2) that this principle is "embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention 'shall be exercised in conformity with the laws and regulations of the receiving State,'" *ibid.;* and (3) that the federal procedural default rule, as a later-in-time federal statute, superseded any inconsistent

provision in the Convention, *id.*, at 376.

I do not believe that *Breard* controls the outcome of these cases. With respect to the third ground for the Court's decision, *Breard* concerned a *federal*, rather than (as in Bustillo's case) a *state*, procedural default rule. Those different kinds of rules are treated differently under the Supremacy Clause. See *ibid.* (applying the rule that "'an Act of Congress . . . is on a full parity with a treaty, and . . . when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null'"). Contrary to JUSTICE GINSBURG's view, then, *ante*, at 4, there is no anomaly in treating state law differently from federal law for these purposes, if Congress chooses to enact legislation binding only the federal government in respect to a matter covered by a treaty that binds both the federal government and the States. Therefore, reading the Convention to require the state courts to set aside Virginia's procedural default rule in Bustillo's case (assuming for argument's sake that his case meets the criteria I have described, see *supra*, at 15–16) would not call into question, let alone overrule, "*Breard*'s plain holding that the Convention does not trump the *[federal]* procedural default doctrine," *ante*, at 18, n. 4 (opinion of the Court), even if that ruling on its own terms is still good law after *Avena* and *LaGrand*.

Moreover, the ICJ decided *Avena* and *LaGrand* after this Court decided *Breard*. And it is not difficult to reconcile those cases with *Breard* because they do not directly conflict with *Breard*'s result. Rather, they interpret Article 36(2) to require state procedural default rules *sometimes* to give way to the Convention, namely, when those rules prevent effective remedy by barring assertion of a claim because of a delay caused by the Convention violation itself. I would read *Breard* as consistent with this interpretation, *i.e.*, as not saying that the Convention *never* trumps any procedural default rule.

The Court complains that this treatment of *Breard* fails to give our own opinions "'respectful consideration.'" *Ante*, at 18, n. 4. In fact, our opinions are entitled to far more than respectful consideration; they are entitled to full *stare decisis* effect. But, as I have explained, reading *Breard* not to decide the outcome in this case would neither overrule *Breard's* holding, nor reject outright its reading of the Convention. And, in any event, as a matter of the law of *stare decisis*, a modified reading of *Breard* is appropriate in light of the fact that the ICJ's later decisions amount to a "significant . . . subsequent development" of the law sufficient to lead to a reconsideration of past precedent. *Agostini* v. *Felton*, 521 U. S. 203, 236 (1997); *United States* v. *Percheman*, 7 Pet. 51 (1833) (revisiting prior treaty interpretation when new international law has come to light); see also *Medellín*, 544 U. S., at 689 (O'Connor, J., dissenting) ("In the past the Court has revisited its interpretation of a treaty when new international law has come to light" (citing *Percheman*, *supra*, at 89)). Indeed, the Court seems to recognize as much, in that it spends a full six pages explaining why the ICJ's interpretation of the Convention is incorrect, see *ante*, at 18–24, rather than simply rejecting Bustillo's argument on the ground that "'respectful consideration' of precedent should begin at home." *Ante*, at 18, n. 4.

And there are other reasons not to place too much reliance on the breadth of *Breard's* language. *Breard* is a *per curiam* decision that the Court had to reach within the few hours available between the time a petition for certiorari was filed and a scheduled execution, the decision is fairly recent, and the modification to which I refer requires no more than reading an exception into *Breard's* language, language that in any event was not central to the Court's holding.

The modification is appropriate too because the "full effect" proviso in Article 36(2) provides a "clear and ex-

press statement" that sometimes the Convention might trump a domestic procedural rule. And in any event, it is not even clear that such a clear statement rule actually exists. *Breard's* statement of a presumption that only a treaty provision with a "clear and express statement" can trump "the procedural rules of the forum State," 523 U. S., at 375, is in tension with more fundamental interpretive rules in this area. See, *e.g.*, *Jordan* v. *Tashiro*, 278 U. S. 123, 127 (1928) (treaties must be construed liberally to protect substantial rights); *Asakura*, 265 U. S., at 342 (same); see also Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, Art. 27, 1115 U. N. T. S. 331, T. S. No. 58 (1980), 8 I. L. M. 679 (1969) (treaty parties may not invoke domestic law as an excuse for failing to conform to their treaty obligations).

Indeed, the cases *Breard* cites for the proposition that a clear and express statement is required to trump a domestic procedural rule seem not to establish it. *Sun Oil Co.* v. *Wortman*, 486 U. S. 717, 723 (1988) (Court said only that it was a "rule in international law at the time the Constitution was adopted" that procedural rules "may be governed by forum law even when the substance of the claim must be governed by another State's law"; case involved domestic law and the Constitution's Full Faith and Credit Clause); *Le Roy* v. *Crowninshield*, 15 F. Cas. 362, 365, 371 (Mass. 1820) (case involved conflict of laws, not an international treaty); *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U. S. 694, 700 (1988) (case said that "we almost necessarily must refer to the internal law of the forum state" to find a service of process standard if a treaty "does not prescribe" it); *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 539–540, and n. 25 (1987) (case involving a specific treaty, not a general interpretive standard).

Finally, the Court says it would be odd to treat Conven-

tion rights more favorably than rights protected by the U. S. Constitution. *Ante*, at 24. But "[a] treaty is in its nature a contract between two nations," *Foster*, 2 Pet., at 314, and nations are of course free to agree to grant one another's citizens protections that differ from the protections enjoyed by citizens at home, particularly when circumstances call for differential treatment. See *infra*, at 30.

In sum, I find strong reasons for interpreting the Convention as sometimes prohibiting a state court from applying its ordinarily procedural default rule to a Convention violation claim. The fact that the ICJ reached a similar conclusion in *LaGrand* and *Avena* adds strength to those reasons. And I cannot agree with the majority's arguments to the contrary.

Consequently, I would remand No. 05–51 so that Bustillo can argue to the Virginia state courts that they should modify their ordinary procedural default requirements. I would leave it to the state courts to determine in the first instance whether state law has provided Bustillo the effective remedy that the Convention requires and how it has done so (whether through "cause and prejudice" exceptions, ineffective-assistance-of-counsel claims, or other ways). Cf. *LaGrand*, 2001 I. C. J., at 33, ¶125 (the "choice of [implementing] means must be left to the United States").

IV

The final question presented asks whether a Convention violation "result[s] in the suppression" of the evidence, say a confession, that a foreign national provided police before being informed of his Convention rights. Pet. for Cert. in No. 04–10566, p. i. The majority answers in absolute terms, stating that "suppression is not an appropriate remedy for a violation of the Convention." See *ante*, at 2. I agree with the majority insofar as it rejects the argu-

ment that the Convention creates a *Miranda*-style "automatic exclusionary rule." *Ante*, at 8; see also *Miranda*, 384 U. S., at 471; cf., *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Franks* v. *Delaware*, 438 U. S. 154 (1978). But I do not agree with the absolute nature of its statement. Rather, *sometimes* suppression could prove the only effective remedy. And, if that is so, then the Convention, which insists upon effective remedies, would require suppression in an appropriate case. Art. 36(2), 21 U. S. T., at 101.

Much depends upon the circumstances. It may be true that in "most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police." *Ante*, at 14. *Miranda* surely helps, for it guarantees that police will inform an arrested foreign national of his right to contact a lawyer. But one cannot guarantee in advance that *Miranda* will adequately cure *every* seriously prejudicial failure to inform an arrested person of his right to contact his consular post. One can imagine a case, for example, involving a foreign national who speaks little English, who comes from a country where confessions made to the police cannot be used in court as evidence, who does not understand that a state-provided lawyer can provide him crucial assistance in an interrogation, and whose native community has great fear of police abuse. Indeed, Sanchez-Llamas made allegations similar to these in his case. Brief for Petitioner Sanchez-Llamas 5-7; see also Brief for the Government of the United Mexican States as *Amicus Curiae* 10.

While JUSTICE GINSBURG is correct that a defendant who is prejudiced under the Convention may be able to show that his confession is involuntary under *Miranda*, *ante*, at 2, I am not persuaded that this will always be so. A person who fully understands his *Miranda* rights but does not fully understand the implications of these rights for our legal system may or may not be able to show that

his confession was involuntary under *Miranda*, but he will certainly have a claim under the Vienna Convention. In such a case suppression of a confession may prove the only effective remedy. I would not rule out the existence of such cases in advance.

Furthermore, the majority is wrong to say that it would "be startling if the Convention were read to require suppression" in such cases because suppression "is an entirely American legal creation." *Ante*, at 8 (opinion of the Court). I put to the side the fact that "suppression" is in origin a British, not an American, remedy. See *Dickerson* v. *United States*, 530 U. S. 428, 433 (2000) (noting that "the roots of the *[Miranda]* test developed in the common law" and citing English cases); see also *King* v. *Warickshall*, 1 Leach 262, 263–264, 168 Eng. Rep. 234, 235 (K. B. 1783) (coerced confessions are inadmissible in British courts). Regardless, it is not "startling" to read the Convention as *sometimes* requiring suppression. That is because those who wrote the Convention were fully aware that the criminal justice systems of different nations differ in important ways. They did not list particular remedies. They used general language. That language requires every member nation to give "full effect" to Article 36(1)'s "purposes." Art. 36(2), 21 U. S. T., at 101. That language leaves it up to each nation to determine how to implement Article 36(1)'s requirements. *Avena*, 2004 I. C. J., ¶127; *LaGrand*, *supra*, at 32–33, ¶125. But as a matter of logic and purpose that language must also insist upon the use of suppression if and when there are circumstances in which suppression provides the only *effective remedy*.

These differences may also help to explain what the majority says is the disturbing circumstance that "nearly all" other signatories to the Convention "refuse to recognize" suppression "as a matter of domestic law," and therefore that "Sanchez-Llamas would [not] be afforded the relief he seeks here in any of the other 169 countries party

to the Vienna Convention." *Ante*, at 9. In fact, there are several cases from common-law jurisdictions suggesting that suppression is an appropriate remedy for a Convention violation. See, *e.g.*, *Tan Seng Kiah* v. *Queen* (2001) 160 F. L. R. 26 (Ct. Crim. App. N. Terr.) (Australian case suppressing confession obtained in violation of statute requiring police to notify defendant of right to contact consulate upon arrest); *Queen* v. *Tan* [2001] W. A. S. C. 275 (Sup. Ct. W. Australia in Crim.) (Australian case considering but declining to suppress evidence based on violation of same statute); *Regina* v. *Partak*, 160 C. C. C. 3d, at ¶63 (Canada) (concluding that suppression is inappropriate, not because it was never a proper remedy under the Vienna Convention but because the defendant "completely failed to demonstrate any prejudice arising from the failure of the police to notify him of his consular rights").

I concede the absence of such cases from civil law jurisdictions. But the criminal justice systems in those nations differ from our own in significant ways. Civil-law nations, for example, typically rely more heavily than do we upon judicial investigation, questioning by a neutral magistrate, the compiling of all evidence into a dossier, and later review of that dossier at trial by judges who may sit without our type of jury. In such a system, formal suppression proceedings may prove less frequent. Judges, as a matter of practice, may simply disregard improperly obtained evidence, they may discount the significance of that evidence, or they may adjust the nature of future proceedings or even the final sentence accordingly. See Damaška, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. Pa. L. Rev. 506, 522 (1972) (explaining why many civil law system "provisions regulating the interrogation of defendants are silent as to the admissibility of testimony obtained in violation of proper interrogation procedures");

see also Van Kessel, European Perspectives on the Accused as a Source of Testimonial Evidence, 100 W. Va. L. Rev. 799, 831 (1997) ("Because [civil law] courts decide both questions of law and of fact, exclusionary rules in [those] courts are more appropriately described as rules of decision than rules of exclusion—what evidence the factfinder may use to support its decision, rather than what evidence may be presented to the factfinder. The presiding judge is well acquainted with all evidence in the dossier and often must 'put aside' or 'forget about' evidence which legally cannot be used to support the judgment"); Bradley, The Exclusionary Rule in Germany, 96 Harv. L. Rev. 1032, 1065 (1982) (noting that in German inquisitorial system, for many police violations, "the fact that evidence was legally or illegally obtained is not dispositive"; instead, the "decision to admit or suppress will be determined by balancing the relative importance of the defendant's privacy rights against the seriousness of the offense charged"); Declaration of Professor Thomas Weigend, Annex 3 to Counter-Memorial of the United States, in *Avena*, 2004 I. C. J. No. 128, p. A367, ¶20 (Oct. 22, 2003) (noting that in the German and Dutch legal systems, a procedural violation can lead to a reduced sentence).

Thus, the *absence* of reported decisions formally suppressing confessions obtained in violation of the Convention tells us nothing at all about whether such nations give "full effect" to the "purposes" of Article 36(1). The existence of cases in such nations where a court denies a defense request to suppress, of course, might well shed light on that nation's readiness to provide an effective remedy. The Solicitor General cites one (and only one) such case. See Judgment of Nov. 7, 2001, 5 BGHSt 116 (deciding in light of *LaGrand* that the Convention creates individual rights, but declining to suppress confession). That is the only support I have found for the claim that

somehow the petitioners here are asking the United States to provide that which other countries deny, an effective remedy.

V

The United States joined the Vienna Convention, and urged other nations to join, in order to promote "the orderly and effective conduct of consular relations between States," and to guarantee "the protection of our citizens abroad." Vienna Convention on Consular Relations with Optional Protocol, S. Exec. Doc. No. E, 91st Cong., 1st Sess., 60, 75 (1969). In doing so, the United States, along with the other 169 nations that ratified the Convention, undertook a complex task. They sought not only to protect their consular posts, but also to assure that their nationals would have access to those posts when arrested abroad. But how to enforce those rights poses a difficult question because the enforcement mechanism inevitably will vary depending upon the details of a nation's legal system. For practical, legal, and political, reasons, it is difficult to write enforcement details into an international treaty. Yet without any such guarantees it may prove difficult to prevent an individual nation, through application of its system's details, from denying in practice the rights that the treaty sought to assure.

The Convention deals with this problem by including a general provision that *both* severely limits the treaty's intrusion into the functioning of a domestic legal system *and also* safeguards consular access rights from serious domestic neglect. It does so by stating that those rights shall "be exercised in conformity with the laws and regulations of the receiving State," *provided that* those laws and regulations give "full effect" to Article 36(1)'s purposes. Art. 36(2), 21 U. S. T., at 101.

Applying this provision to our own legal system, I would seek to minimize the Convention's intrusion and federal

intrusion into the workings of state legal systems while simultaneously keeping faith with the Convention's basic objectives. That is why I believe that the Convention here requires individual States to make an exception (akin to a "cause and prejudice" exception) to a state procedural default rule if (1) the defendant's failure to raise a claim of a Convention violation in a timely manner itself was a product of that violation, and (2) state law provides no other procedural means through which the State's courts can provide "review," "reconsideration," and effective relief. Similarly, I would hold that whether the Convention requires a state court to suppress a confession obtained after an Article 36 violation depends on whether suppression is the only remedy available that will effectively cure related prejudice. And because neither state court applied this standard below, I would remand each case for that initial consideration. See 338 Ore., at 269, 108 P. 3d, at 574 (rejecting Sanchez-Llamas' request for suppression remedy solely on the ground that the Convention "does not create rights that individual foreign nationals may assert in a criminal proceeding"); App. to Pet. for Cert. 47a (rejecting Bustillo's request for state postconviction relief based on a standard different from that set forth here).

The interpretation of the Convention that I would adopt is consistent with the ICJ's own interpretation and should not impose significant new burdens upon state criminal justice systems. America's legal traditions have long included detailed rules for discovering and curing prejudicial legal errors. Indeed, many States already have "cause and prejudice" exceptions likely broad enough to provide the "effective" relief the Convention demands. And, in any event, it leaves the States free to apply their own judicial remedies in light of, and bounded by, the Convention's general instructions.

The Court, I fear, does not rise to the interpretive chal-

lenge. Rather than seek to apply Article 36's language and purposes to the federal/state relationships that characterize America's legal system, it simply rejects the notion that Article 36(2) sets forth any relevant requirement. That approach leaves States free to deny effective relief for Convention violations, despite America's promise to provide just such relief. That approach risks weakening respect abroad for the rights of foreign nationals, a respect that America, in 1969, sought to make effective throughout the world. And it increases the difficulties faced by the United States and other nations who would, through binding treaties, strengthen the role that law can play in assuring all citizens, including American citizens, fair treatment throughout the world.

Accordingly, I respectfully dissent.